(10)

No. 92-1479-CFX
Status: GRANTED

Title: McDermott, Inc., Petitioner
v.
AmClyde and River Don Castings Ltd.

Docketed:
March 12, 1993

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Lea,Arden J.

Counsel for respondent: Couhig Jr.,Robert E.

Entry	Date	Note	Proceedings and Orders
1	Mar 12 1993	G	Petition for writ of certiorari filed.
2	Apr 14 1993		DISTRIBUTED. May 14, 1993
3	May 3 1993	P	Response requested -- BRW. (Due June 3, 1993)
4	Jun 3 1993		Brief of respondents AmClyde, et al. in opposition filed.
5	Jun 9 1993		REDISTRIBUTED. June 25, 1993
6	Jun 14 1993	X	Reply brief of petitioner filed.
7	Jun 28 1993		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
8	Jul 28 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Fifth Circuit.
9	Aug 3 1993		Record filed.
		*	Original proceedings United States District Court for the Southern District of Texas (5 boxes)
11	Aug 4 1993		Order extending time to file brief of petitioner on the merits until August 23, 1993.
12	Aug 11 1993		Joint appendix filed.
13	Aug 20 1993		Brief amicus curiae of Maritime Law Association of the United States filed.
14	Aug 23 1993		Brief amicus curiae of United States filed.
15	Aug 23 1993		Brief of petitioner filed.
16	Sep 7 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Sep 22 1993		Brief of respondents AmClyde, et al. filed.
18	Oct 12 1993		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
19	Oct 25 1993		Reply brief of petitioner filed.
20	Nov 16 1993		CIRCULATED.
21	Nov 22 1993		SET FOR ARGUMENT TUESDAY, JANUARY 11, 1994. (1ST CASE).
22	Jan 11 1994		ARGUED.

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92-1479

No. _____

In The

Supreme Court of the United States

October Term, 1992

McDERMOTT, INC.,

Petitioner,

vs.

AmCLYDE, A DIVISION OF AMCA INTERNATIONAL, INC. and RIVER DON CASTINGS, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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107 pp

QUESTIONS PRESENTED

1. Should a plaintiff in a maritime case who settled with three of five defendants be penalized and defendants who forced the matter to trial be rewarded by the Court of Appeals' deduction of both the full dollar amount of the settlement *and* the settling defendants' proportionate share of liability from plaintiff's judgment.

2. In United States maritime law, when there is catastrophic, physical damage to both the "product itself" and to "other property" due to a defective or unreasonably dangerous condition, is the injured party entitled to pursue recovery of its entire damages, physical and economic, caused thereby in tort/products liability.

3. Should obedience to a trial court's order not to present an entire class of damages to the jury, followed by plaintiff's duly accepted proffer of its evidence of such damages, result in a total denial of due process by the Court of Appeals because its panel simply, mistakenly failed to notice the proffered evidence in the record.

LIST OF PARTIES

Parties to the proceedings below were the petitioner McDermott, Inc., the respondents AmClyde, a division of AMCA International, Inc. (formerly "Clyde Iron"), River Don Castings, Ltd., and defendants British Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V.

RULE 28.1 LIST

The parent corporation of McDermott Incorporated is McDermott International, Inc.

Subsidiaries, Affiliates and Partnerships of McDermott International, Inc. (Excluding Wholly-Owned Subsidiaries)

Davy McDermott Ltd.
Initec, Astano Y McDermott International Inc., S.A.
Malmac Sdn. Bhd.
McDermott Arabia Company Ltd.
McDermott-ETPM, Inc.
P.T. McDermott Indonesia
McDermott Incorporated
B&W Mexicana, S.A. de C.V.
Babcock & Wilcox Beijing Company, Ltd.
Diamond Power Hubei Company Ltd.
Babcock & Wilcox Gama Kazan Teknolojisi Anonim Sirketi
Thermax Babcock & Wilcox Private Ltd.
Hudson Northern Industries, Inc.
Rotovent S.A. de C.V.
Diamond Power (Australia) Pty. Limited
Halley & Mellowes Pty. Ltd.
Heerema-McDermott (Aust.) Pty. Ltd.
HeereMac
Panama Offshore Chartering Company, Inc.
McDermott (Nigeria) Limited
McDermott Scotland Limited
MMC – McDermott Engineering Sdn. Berhad
P.T. Babcock & Wilcox Indonesia
P.T. Bataves Fabrications

RULE 28.1 LIST – Continued

Topside Contractors of Newfoundland, Ltd.
Arabian Petroleum Marine Construction Company
DB/McDermott Company
Abahsain Hudson Heat Transfer Co. Ltd.
Construcciones Maritimas Mexicanas, S.A. de C.V.
ASEA Babcock PFBC
B&W Fuel Company
B&W Nuclear Service Company
Babcock-Ultrapower Jonesboro
Babcock-Ultrapower West Enfield
Diamond Power Specialty Limited
Espacialidades Termomecanicas S.A. de C.V.
Babcock & Wilcox Services, Inc.
KBW Gasification Systems, Inc.
North American CWF Partnership
Palm Beach Energy Associates
Maine Power Services
PowerSafety International, Inc.
South Point CWF

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In The

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, McDermott, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on 11 December 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 979 F.2d 1068 (5th Cir. 1992), and is reprinted in the Appendix, p. A-1, *infra*. The denial of

petitioner's request for rehearing en banc, also treated as a request for panel rehearing, is reprinted in the Appendix, p. A-33, *infra*. The verdict, memoranda decisions, and judgments of the United States District Court for the Southern District of Texas (Houston Division) (U.S. Magistrate Judge George A. Kelt, Jr.) are not reported. They are reprinted in the Appendix, pp. A-35-58, *infra*.

JURISDICTION

Petitioner invoked federal jurisdiction under 28 U.S.C. §§ 1332 and 1333, bringing suit in the U.S. District Court for the Southern District of Texas, Houston Division. A jury trial was held 13 November – 17 December 1990. At the outset of trial the court, under the rubric of respondent AmClyde's Motion in Limine, denied *in toto* McDermott's claims for damage to the Shearleg Crane and ordered that no evidence or argument thereon would be permitted. Also at the outset of trial, a sixty-day order of dismissal was entered on plaintiff's settlement of all claims against defendants, British Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V. (hereinafter referred to as "sling defendants").

After trial, the court considered briefing and held a hearing on AmClyde and River Don Castings, Ltd.'s Motion for Credit for the sling defendants' settlement. The court duly denied AmClyde and River Don's motion for a "*Hernandez*" credit and entered judgment on the verdict 17 January 1991. Petitioner and Respondents each sought relief from adverse aspects of the judgment under Federal Rules of Civil Procedure 50 and 59, which was

denied and a "Superseding Final Judgment" entered 14 March 1991.

Petitioner and Respondents filed timely Notices of Appeal and prosecuted their appeal and cross-appeal to the Court of Appeals for the Fifth Circuit. On 11 December 1992, the panel opinion of the Court of Appeals was filed. Petitioner applied for rehearing en banc, which, along with panel rehearing, was denied.

The jurisdiction of this Court to review the judgment of the Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

All statutes involved are referenced in the "Jurisdiction" section, *supra*.

STATEMENT OF THE CASE

McDermott, Inc. filed a complaint with jury demand on 18 July 1988 in the Southern District of Texas, Houston Division. Named defendants and served were River Don Castings, Ltd., Clyde Iron, a Division of AMCA International (later known as AmClyde), International Southwest Slings, Inc. (hereinafter, "ISSI"), and British Ropes, Ltd. The complaint was amended to add defendant Hendrik Veder B.V. 3 May 1989 and Clyde Iron filed its cross-claim for contribution and indemnity against all other defendants 4 May 1989.

AmClyde filed a motion for partial summary judgment, seeking dismissal of McDermott's tort/products liability claims against it on 25 September 1989. AmClyde then filed a third party complaint against Hudson Engineering, Inc., a sister company of McDermott, Inc., and a counter-claim against McDermott for the cost of AmClyde's warranty replacement of the Shearleg Crane's defective, broken main hook, 19 October 1989. AmClyde's Motion for Partial Summary Judgment was denied on 28 December 1989.

On 28 August 1990, pursuant to the parties' consent, the entire case was referred to Magistrate Judge Kelt to conduct all further proceedings, through trial and entry of final judgment.

AmClyde, in a coordinated effort by defendants, moved for reconsideration of its previously denied Motion for Partial Summary Judgment, while the "sling defendants," British Ropes, ISSI, and Hendrik Veder also filed a Motion for Partial Summary Judgment, all on 14 September 1990. Said motions were duly opposed by McDermott and plaintiff countered with its own Motion for Partial Summary Judgment against AmClyde on 17 October 1990.

There is no express ruling on these motions in the record, though convening trial indicated their denial. Plaintiff and the three "sling defendants" reached a settlement, the day before trial, of McDermott's claims against them, for damage to both the SNAPPER deck and the Shearleg Crane, in exchange for one million dollars, to be paid within sixty days.

Trial began 13 November 1990. That morning, defendants AmClyde and River Don announced that they had entered into a settlement whereby they would join their defense under one counsel, that previously of AmClyde, alone. AmClyde also reurged the substance of its previously denied Motions for Partial Summary Judgment in a Motion in Limine, as well, as arguments that the SNAPPER deck was not "other property," seeking entry of judgment absolving AmClyde of all liability. The court, in part, granted summary judgment on AmClyde's motion, and extended it to River Don, denying McDermott any recovery against them, whether in tort or contract/warranty, for damages to the Shearleg Crane. Record excerpts reflecting the trial court's ruling, amounting to a summary judgment, are included in the Appendix, pp. A-40-49. McDermott stipulated, by virtue of its settlement with the sling defendants, that it accepted responsibility for any damages which the jury found were caused by the sling's failure. AmClyde abandoned its cross-claims. The trial went forward to the jury, therefore, solely on the issues of liability and damages to the SNAPPER deck and AmClyde's counter claim for the cost of replacing the defective hook.

McDermott objected to and sought reconsideration of the trial court's preclusion of its case for damages to the Shearleg Crane under both tort and contract prongs of *East River*. Upon denial of reconsideration, at the outset of trial, 14 November 1990, and at the close of its case, 6 December 1990, McDermott proffered the evidence of its Shearleg Crane damages. A summary of these damages,

proffered for the trial record, is reproduced in the Appendix with the summary of "deck" damages actually admitted in evidence at pp. A-66-67.

The jury returned its verdict, 7 December 1990, finding AmClyde 32% liable, River Don, 38% liable, and "McDermott/Sling defendants" 30% liable for the accident. The jury apportioned causation rather than fault, due to the combination of warranty, tort, and strict liability theories of liability presented. No liability was attributed to Hudson Engineering on AmClyde's third party demand and the jury found against AmClyde and in favor of McDermott, denying AmClyde's counterclaim for the cost of the replacement hook. The jury found McDermott's damages, solely to the SNAPPER deck, to be $2,100,000.

The trial court withheld judgment to consider AmClyde and River Don's request for credit from the plaintiff's settlement with the sling defendants. The trial court duly denied defendants' motion for a "dollar for dollar" credit from the sling defendants' settlement and entered judgment on the verdict dividing damages in accordance with the jury's allocation of liability: $672,000 against AmClyde, $798,000 against River Don, and deducting $630,000 reflecting the combined contribution to the accident of McDermott, Inc. and the "sling defendants;" and awarded McDermott its costs as prevailing party.

Plaintiff and Defendants filed timely motions for new trial, judgment notwithstanding the verdict, and/or to alter or amend the judgment. Defendants' Motion for judgment N.O.V. and for new trial was denied 13 March

1991. Plaintiff's Motion for Post-Judgment Relief was denied 14 March 1991 and final judgment entered. McDermott and defendants, AmClyde and River Don, filed timely notices of appeal to the Court of Appeals for the Fifth Circuit.

AmClyde and River Don, designated appellants/cross-appellees in the Fifth Circuit and McDermott, as appellee/cross-appellant duly prosecuted their appeals and the Fifth Circuit rendered its opinion 11 December 1992. McDermott prevailed on appeal in that it was awarded a money judgment, albeit reduced to $470,000.00, against River Don. However, McDermott's verdict and judgment against AmClyde were summarily vacated, denying all recovery under tort or contract theories. The Fifth Circuit also refused to notice a box-full of proffered evidence in the record of McDermott's Shearleg Crane damages, and denied McDermott its right to present this evidence to a jury. McDermott timely petitioned the Fifth Circuit for rehearing en banc.

The Fifth Circuit, treating McDermott's petition for rehearing en banc as one for panel rehearing, denied same. Rehearing en banc was also denied, all by Order dated 25 January 1993. McDermott submits this application for writ of certiorari to review the Fifth Circuit's ruling herein within ninety days from filing of the Court of Appeals' decision.

STATEMENT OF FACTS

McDermott, Inc. was supplied a marine heavy lift crane with a warranted capacity of 5000 short tons plus ten percent impact load by Clyde Iron (now "AmClyde") at a cost of approximately $7 million. The crane's self-stowing design led to its nomination as the "Shearleg" crane. On 10 October 1986, the Shearleg Crane, mounted aboard McDermott's preexisting barge, the Intermac 600 (hereinafter "I600"), was attempting its first offshore lift: an approximately 4100 short ton oil and gas production platform called the "SNAPPER deck", which McDermott had built and was to install for its client on a structural steel base, known as a "jacket", affixed to the floor of the Gulf of Mexico, off the Texas coast, East Breaks block 165. Shortly after the Shearleg crane lifted the SNAPPER deck from its transport barge, one huge prong of the Shearleg's main hook broke off and plummeted down into the top of the SNAPPER deck. An eleven inch diameter, steel cable-laid sling then immediately unraveled at its "eye-splice," dropping half the 4100 ton deck down onto its transport barge and causing it to sway, striking the boom of the Shearleg crane. The shock of these sudden, massive load shifts wrought havoc with the stability of the I600, the SNAPPER deck's transport barge, and the integrity of the crane's heavily loaded cable reeving. Over one hundred people, including an AmClyde representative, were aboard the I600 at the time of this incident, all of whom were in easy striking distance of snapping steel cables or collapsing steel components. Most of the I600's passengers ran away from the working end of the crane boom. At least one person was injured in the rush. Fortunately, McDermott's crane operator suppressed panic

and immediately began to lower the part of the SNAPPER deck still dangling from the remains of the hook, thus relieving the tension on the crane and averting further disaster.

The Shearleg Crane and SNAPPER deck were towed back to McDermott's fabrication facilities for repairs. McDermott was obligated to deliver the SNAPPER deck, installed and fully operational on a tight schedule. Therefore, McDermott had to contract with its primary competitor to lift and set the SNAPPER deck at a cost, for the lifting services alone, of approximately $300,000.00. McDermott accomplished the repairs to the SNAPPER deck, set it on location, and delivered it to its client.

The Shearleg Crane, however, required extensive repairs. *Inter alia*, the main hook had to be replaced; damaged steel cable reeving had to be replaced; sections of the crane boom had to be repaired or replaced all due to damage received when the hook broke on 10 October 1986. Another offshore deck installation required the Shearleg crane on 8 December 1986. McDermott completed its repairs by that time, but had to adapt the crane's block to use another hook, as AmClyde had not yet provided a replacement for the broken one.

On 10 October McDermott advised AmClyde and British Ropes of their products' failures, and on 13 October 1986 made its call in warranty against AmClyde. Shortly thereafter, McDermott and AmClyde agreed to send the failed hook to Packer Engineering for metallurgical and mechanical tests and analysis, in an effort to determine the cause of its failure. Packer's tests and analysis indicated that the hook did not meet required

specifications and, particularly, found substantial cast-in flaws on the fracture surface that were involved in the failure of the hook. This information, combined with eyewitness observations, corroborating evidence gleaned from analysis of the structural damage to the deck, and the position of the broken prong when it imbedded in the SNAPPER deck, all showed that the hook was defective and that its failure, more probably than not, precipitated the accident of 10 October 1986. AmClyde obtained a contrary analysis, laying blame on the cable-laid sling's failure and blaming the sling's failure on an alleged "unwinding" effect produced by linking left hand and right hand cable-laid slings together end-to-end.

AmClyde denied McDermott's warranty claim for the replacement hook and repairs, claiming that the hook did not cause the accident, although the contract warranty provision called for free replacement of "defective" parts regardless of whether they caused an accident. McDermott, acting under close schedule constraints for the Shearleg crane in its offshore construction projects, reserved its rights and issued purchase orders to obtain a new hook and AmClyde's services to repair the crane. A replacement hook was finally delivered and installed just before the Shearleg began a tow to West African offshore construction sites, 28 May 1987. AmClyde, for its part, at all times maintained charges against McDermott for the replacement hook, regardless of its defects, because it blamed the cable laid sling failure for the 10 October 1986 accident. The present action ensued.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT COURTS ARE IN CONFLICT ON THE EFFECT IN MARITIME LAW OF A PLAINTIFF'S SETTLEMENT WITH LESS THAN ALL DEFENDANTS UPON THE LIABILITY OF NON-SETTLING DEFENDANTS

The Fifth Circuit, in the present case, applied its recently adopted rule of granting non-settling defendants automatic contribution from a settlement through a dollar-for-dollar credit against plaintiff's judgment, despite the fact that, per precedent in force at the time of trial, the settling tort feasors' *pro rata* share of liability was determined and also deducted from the injured party's recovery. This quandary graphically demonstrates the present disharmony in federal maritime law on the issue and the injustice of the Fifth Circuit's automatic "dollar for dollar" contribution scheme.

The lack of uniformity in the maritime law with respect to a settlement's effect on non-settling defendants' rights or liabilities in judgment and/or contribution has been noted as a substantial problem in maritime litigation, ripe for Supreme Court resolution.[1]

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[1] Chairperson of the Maritime Law Association of the United States, Committee on Uniformity, Lizabeth L. Burrell, Esq. wrote, "In the wake of the Supreme Court's decision in *United States v. Reliable Transfer Co.* and *Edmonds v. Compagnie Generale Transatlantique* courts were confronted with the need to reconcile the *Reliable Transfer* notion of comparative fault with the *Edmonds* concept of joint and several liability. One of the most troublesome issues in this area concerns the rights and liabilities of settling and non-settling tort feasors in connection with contribution and indemnity. . . . The decision and

A panel of the Fifth Circuit quietly adopted its present *pro tanto* credit approach to partial settlements in a longshoreman's case, *Hernandez v. M/V RAJAAN*, 841 F.2d 582, 591 (5th Cir. 1988), relying upon *Self v. Great Lakes Dredge & Dry Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), a seaman's case. The *Hernandez* court paid lip service to its prevailing precedent, *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), but ignored *Leger*'s denial of contribution and determination that the settlement satisfied the settling defendant's *pro rata* liability. The Fifth Circuit's adoption of the Eleventh Circuit's *Self* rule has since grown into a total rejection of *Leger* and the *Reliable Transfer*[2] rule of comparative apportionment of liability in this context.

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comparison are at this time comprehensive and it is time for a uniform choice to be made. "Uniformity in Maritime Law," 5 U.S.C. Mar.L.J. 67, 83-85 (Fall 1992).

Please also see, E. Reddick, "Supreme Court Review of Admiralty and Maritime Issues: What's on the Horizon?", 5 U.S.F.Mar.L.J. 43, 53-57 (Fall 1992); G. Schill, "Recent Developments Regarding Maritime Contribution and Indemnity," 51 La.L.R. 975 (May 1991); E. Johnson, "The Conflicting Doctrines of *Self* and *Leger*: The Unsettling Uncertainty of Settlement in Admiralty," 41 Ala.L.Rev. 471 (Winter 1990) [" . . . the conflicting authority has created much anxiety and second guessing in maritime cases over whether or not to settle. . . . Clearly, however, the situation calls for Supreme Court review to provide the uniformity expected of federal courts sitting in admiralty."]; E. Caffrey, "Holding the Bag-Proportional Fault and the Non-Settling Defendant: *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1988 A.M.C. 2278 (11th Cir. 1987), cert. denied, 108 S.Ct. 2017, 1988 A.M.C. 2402 (1988)," 14 Tul.Mar.L.J. 415 (Spring 1990).

[2] *U.S. Reliable Transfer, Co.*, 421 U.S. 397, 1975 A.M.C. 541 (1975).

The litigation history of the Eleventh Circuit *pro tanto* settlement credit rule began with *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982) which initially parted company with *Leger*, reversing and remanding the case for a new trial holding it error to present an absent settling defendant's fault to the jury for apportionment. *Id.* at 719. The case returned to the Court of Appeals in *Self v. Great Lakes Dredge & Dry Dock, supra*, which expressly disavowed *Leger*'s *pro rata* credit for settlement rule, despite Chevron's, the settling tort feasor's, presence at the post-*Ebanks* trial on allocation of liability. *Id.* at 1547. *Self* considered itself bound by *Edmonds* to ignore Chevron's comparative liability and to effect the remedial nature of the Jones Act by protecting its seaman "ward" from a poor settlement made with Chevron. Thus, the Eleventh Circuit applied *pro tanto* credit for *Self*'s settlement to *Great Lakes'* judgment liability. The case was, nonetheless, remanded again for further proceedings in regard to the plaintiff's damages.

A third appeal, *Great Lakes Dredge & Dry Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d 1575 (11th Cir. 1992) ensued and brought the credit for settlement and comparative liability problem full circle through *Great Lakes'* action for contribution against Chevron. Despite the Court of Appeals' reliance in *Self* upon *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975)[3] which established that settlement barred contribution claims, the Eleventh Circuit rendered Chevron's settlement nugatory

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[3] Adopted as precedent of the newly formed Eleventh Circuit per *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

and again reversed and remanded the case, now for trial of the very comparative liabilities it held improperly tried in *Self*. Only the Fifth Circuit's summary application of both the settling defendants' *pro rata* liability *and* the *pro tanto* credit for settlement in the present case against McDermott's judgment could be more arbitrary and unjust.

The Eighth Circuit's position is in direct conflict with the *pro tanto* credit for settlement approach of the Fifth and Eleventh Circuits. In *Associated Electric Corp. v. Mid-American Transportation Co.*, 931 F.2d 1266 (8th Cir. 1991), the Court of Appeals gave searching consideration to the disarrayed state of the law on this issue, the recommendations of scholarly commentators[4] and the pragmatic observations of trial court decisions. It concluded that the "proportional fault" or "*pro rata*" credit for settlement and bar against contribution in *settlement* cases, as opposed to *Edmonds statutory* immunity cases, best served all legal and policy concerns. The Eighth Circuit succinctly noted what the Fifth and Eleventh have forgotten: that "settlement dollars may be worth more or less than judgment dollars, depending on which party received the more favorable settlement." *Id.* at 1271, citing *Leger*, 592 F.2d at 1250 n.10.

The Ninth Circuit, in *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989) also traversed its options, for dealing with a partial settlement and concluded that a "good faith" settlement should bar contribution, but did not

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[4] T. Schoenbaum, *Admiralty and Maritime Law*, § 4-15, at 153-4 (1987 ed.) (endorsing proportional fault approach).

reach the question of whether the plaintiff's judgment should be reduced by *pro rata* or *pro tanto* application of her settlement. The Court's discussion of the Uniform Contribution Among Tort Feasors Act's evolution from the unbridled contribution rule of the 1939 draft,[5] through the "good faith" settlement bar in 1955[6], to the present rule of *pro rata* satisfaction of the settling tort feasor's liability, adopted in 1977,[7] may indicate a preference for the *pro rata* approach. This inference is bolstered by the Court's approval of methodology to ascertain "good faith" by comparing the settlement to the settling defendant's proportionate, potential liability and by its proper limitation of *Edmonds*, to its statutory context.

Other Circuit Courts of Appeals have addressed ostensibly similar issues with disparate results.[8] In short,

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[5] 12 U.L.A. 99 (1975).

[6] 12 U.L.A. 99-100 (1975).

[7] 12 U.L.A. Supp. 40, 52-53 (1989).

[8] First Circuit: *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987) (addressed the statutorily created imbalance in liability imposed by a shipowner's right to limit liability under 46 U.S.C. § 183, *et seq.*, not a private settlement of litigation between parties);

Second Circuit: *Stanley v. Bertram-Trojan, Inc.*, 781 F.Supp. 218 (S.D.N.Y. 1991) (scholarly analysis of the problem; adopted the "proportional fault" or "*pro rata*" approach to non-settling tort feasors' liability);

Third Circuit: *Dobbins v. Crain Bros., Inc.*, 567 F.2d 559 (3rd Cir. 1977) (a longshoreman's case governed by the pre-1972 law which permitted unseaworthiness recovery against a shipowner and *Ryan* indemnity. The Court set off, *pro tanto*, the employer's settlement of "non-compensation" claims with the plaintiff against the shipowner's liability, anticipating that the shipowner would recoup indemnity from the employer);

Fourth Circuit: *Burden v. U.S.*, 1993 AMC 40 (S.D.W.Va. 1992) (imposed a settlement bar to contribution, but indicated

the maritime law, in which uniformity is of grave importance, is in such disarray with regard to the effect of settlement with less than all defendants in a multi-party case, that neither courts nor parties can effectively order their affairs except by unrelenting litigation to judgment. McDermott seeks the guidance of this Honorable Court to correct the Fifth Circuit's unjust reduction of its damages by *both pro rata* and *pro tanto* credits for settlement and to provide a considered, fair and uniform rule for all inferior courts.

II. THE FIFTH CIRCUIT HAS OVERSTEPPED THIS COURT'S RULING IN *EAST RIVER* BY DENYING *ALL* RECOVERY OF ANY DAMAGES AGAINST AMCLYDE AND BY DENYING ALL RECOVERY OF DAMAGE TO THE "PRODUCT ITSELF," AGAINST RIVER DON EVEN THOUGH McDERMOTT SUFFERED PHYSICAL DAMAGE TO "OTHER PROPERTY" IN THE SAME CATASTROPHIC INCIDENT

This Honorable Court's landmark decision, *East River SS. Corp. v. Transamerica Delaval, Inc.*[9], expressly incorporated products liability into the law of admiralty. *East River* did not, however, address the situation presented here – violent, catastrophic physical damage to the product itself *and* other property. Nor did *East River* reach

availability of a *pro tanto* "set off" of the settlement against judgment; *Doyle v. U.S.*, 441 F.Supp. 701 (D.S.C. 1977) adopted an equitable or *pro rata* reduction of non-settling tort feasors' liability.

[9] 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 865 (1986).

issues of comity or uniformity in the international maritime community with regard to the products liability and economic loss issues now before the Court.[10] Such issues, not raised by the facts of *East River*, were left open and are implicated by the present action.

East River's jurisprudential and public policy underpinnings provide some guidelines to aid inferior courts in doing justice by forwarding tort law concerns for physical safety and contract/warranty concerns for product value through a coherent law of maritime products liability. The Fifth Circuit has stripped *East River* of these underpinnings, using it as a "bright line" scythe to clear injured plaintiffs, like McDermott, from its docket. Manufacturers need show little concern for the safety of their products, if they are destined for the Gulf of Mexico. That is contrary to the policy *East River* announced for maritime products liability.[11]

This Honorable Court said:

> "The paradigmatic products-liability action is one where a product reasonably certain to place

[10] R. Force, "Maritime Products Liability in the United States," 11 Mar.L. 1, 3 (1986).

[11] Nonetheless, at least one commentator noted that *East River* might be used by manufacturers in litigation, as in the present case, to wholly avoid responsibility for truly dangerous products: "In reality, the decision provides comfort to manufacturers seeking to minimize their responsibility for losses caused by their dangerous products. . . . Of course, litigation will be simplified because the manufacturer will always win these cases . . . ". S. Swanson, "The Citadel Survives . . . ," 12 Tul.Mar.L.J. 135, 139 (1987).

life and limb in peril, distributed without reinspection, causes bodily injury. See, e.g. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1051, 1053 (1916). The manufacturer is liable whether or not it is negligent because public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d, at 462, 150 P.2d, at 441 (opinion concurring in judgment).

For similar reasons of safety, the manufacturer's duty of care was broadened to include protection against property damage. See *Marsh Wood Products Co. v. Babcock & Wilcox Co.*, 207 Wis. 209. 226. 240 N.W. 392, 399 (1932); *Genesee County Patrons Fire Relief Assn. v. L. Sonneborn Sons, Inc.*, 263 N.Y. 463, 469-473, 189 N.E. 551, 553-555 (1934). Such damage is considered so akin to personal injury that the two are treated alike. See *Seely v. White Motor Co.*, 63 Cal.2d, at 19, 45 Cal.Rptr., at 24, 403 P.2d, at 152.

> In the traditional property damage cases, the defective product damages other property. In this case, there was no damage to other property.

East River, 476, U.S. at 866-867, 106 S.Ct. at 2300.

The Court's references *inter alia* to *MacPherson*, *Seely*, *Robins Dry Dock*,[12] *TESTBANK*,[13] and the Restatement

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[12] *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134 (1927).

[13] *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (en banc), *cert denied*, 477 U.S. 903, 106 S.Ct. 327 (1986).

(second) of Torts §§ 395 and 402A suggest that while *East River* fashioned a new rule for United States maritime law, it did not break entirely with established principles regarding recovery of economic losses in tort. Thus, *East River*, and even Fifth Circuit jurisprudence, until the present case, stood for the proposition that pure economic losses, *without* physical injury to a "proprietary interest" were not compensable in tort and for its corollary, that where, as in this case, there *is* physical damage to a plaintiff's proprietary interest, recovery of all damages occasioned by the tortious incident is available in tort/products liability. There is no indication in *East River* or its supporting materials that economic losses, occurring in a tortious incident with physical damage to "other property" or personal injury must be carved out and separately presented in an independent warranty action, though inextricably intertwined with a tort/products liability action for all other damages.

State courts have experienced and repudiated such "gerrymandering" in products liability cases. The Texas Supreme Court, for instance, nearly a decade before *East River*, presaged its holding in *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977). The *Nobility* Court also looked to *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145 (1965), for expression of the proposition:

> The distinction that the law was drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical

> injury. The distinction rest, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. *He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm.* He cannot be held for the level of performance of his products in the consumer's business *unless he agrees that the product was designed to meet the consumer's demands.* [emphasis added].

Seely, 403 P.2d at 151.

Justice Pope of the Texas Supreme Court, in his learned dissent from the majority in *Mid Continent Aircraft v. Curry Cty. Spraying Svc.*, 572 S.W.2d 308, 313 *et seq.* (Tex. 1978) detailed the underpinnings that supported *Seely, Nobility* and ultimately *East River*. "The reason that *Nobility, Melody Home*, and *Seely* held there was no strict liability case for the product itself was the absence of proof and findings that there was a defect that was unreasonably dangerous that produced the accident." *East River* also lacked any such finding. Justice Pope went on to note:

> " . . . '[E]conomic loss' is not the same thing as 'physical harm' that is required by [Restatement 2d Torts] Section 402A. A defect that is not unreasonably dangerous, does not result in an accident, or one that must only be repaired or replaced, is not a tort action. [citation omitted] . . . "
>
> A similar result has been suggested under New York law: '[a] truck's defective brakes may give rise to either economic loss or property damage, depending upon the facts. If the defect

> is discovered and the truck is thereby rendered temporarily unusable, its owner may suffer economic damage, consisting of the costs of repairing the brakes, as well as consequential 'economic loss' of profits resulting from his inability to use the truck in his business. On the other hand, if the defect is not discovered and an accident with another vehicle occurs, *the damage to both the truck and the other vehicle resulting from the impact constitutes property damage.* It may be noted that damage to the defective product itself may only amount to property damage and not economic loss. It is only when damage results from non-accidental causes, such as deterioration or breakdown, that economic loss in the pure sense, rather than property damage, has occurred. Zammit, 'Manufacturers' Responsibility for Economic Loss Damages in Products Liability Cases: What Result in New York?' 20 N.Y.L.F. 81, 82 (1974). [emphasis added]

Mid Continent, supra at 317-318. Justice Pope's position prevailed in the Texas High Court's next opinion on this matter, *Signal Oil & Gas Universal Oil Products*, 572 S.W.2d 320, 325 (Tex. 1978), and remains the law. As Dean Page Keeton said, "A hazardous product that has harmed something or someone can be labeled as part of the accident problem; tort law seeks to protect against this type of harm . . . " Keeton, "Annual Survey of Texas Law, Torts", 32 S.W.L.J. 1, 5 (1978).

The AmClyde-supplied Shearleg Crane and its hook were defective and unreasonably dangerous. They dropped a 4100 ton steel deck, operating in 850 feet of water, with numerous persons in harm's way. The line separating "injury only to the product itself/economic

loss" and "unreasonably dangerous/physical damage" was crossed. The Shearleg Crane was not just a disappointment, it became "part [and parcel] of the accident problem". McDermott's entire loss, including its crane damage, should be cognizable in tort, particularly in strict products liability. Please see R. Force, "Maritime Products Liability in the United States," 11 Mar.L. 1, 33 n. 135, 37 (1986); S. Swanson, "The Citadel Survives. . . . ," *supra*, at 138 and n. 10.

A non-partisan reading of *East River's* disallowance of products liability recovery for "pure economic loss" or injury "solely to the product itself" ". . . raises the inference that, had the defective turbines caused physical injury or damage to other property, a products liability action would lie. . . . " Hon. J. Wisdom, "Admiralty Jurisdiction and Products Liability: Economic Law," 62 Tul.Mar.L.J. 325, 333 (1988). It appears clear that, at least under facts comparable to those presented in *East River*, this Honorable Court diverged from *Seely*, Restatement § 402A, and the majority rule of products liability which allowed recovery for physical damage to the product itself arising from an unreasonably dangerous defect. R. Force, "Maritime Products Liability," *supra*, at 33 and discussion in n.135-136; Note: *"East River Steamship Corp. v. Transamerica Delaval, Inc.*: Admiralty Law – Recovery for Losses Caused by Product Self-Injury," 61 Tul.L.R. 1229, 1234-1235 (1987); S. Swanson, "The Citadel Survives," *supra*, at 147, 155, 156, 169-171. Therefore, if the avowed legal policy bases of *East River* are not to be completely ignored and if products liability's safety concerns are not to drown in a sea of irresponsible free market theory, parties, like McDermott here, who have

suffered physical injuries to "other property" due to catastrophic failure of a product, must be permitted to recover all their provable damages from the parties responsible for the accident.

East River's total exculpation of product suppliers from liability for losses to dangerously defective products alone was not required by the facts of the case. There was no competent evidence that the turbine failures considered in *East River* endangered persons or other property. As such, the safety concerns of tort law and products liability, as stated in Restatement (second) of Torts § 402A were clearly not implicated. With very different facts now before the Court, this "rule" should be reexamined in light of safety policy and judicial administration experience provided by the products liability law of our states, lower federal courts and neighbors in international maritime commerce, as well as the light provided by consideration of the relative scopes of the Uniform Commercial Code and the Restatement's products liability provisions. Such a review would reveal, in sum, that recovery for damages arising from a defective, unreasonably dangerous product itself should lie in products liability rather than the ill-suited confines of warranty. The Uniform Commercial Code was intentionally limited to transactions, not injuries. Karl Llewelyn's attempts to add a 402A-like provision to the Code were rejected as inappropriate. On the other hand, section 402A was clearly intended, by its focus upon defendants ". . . in the business of selling such a product . . . ," to intervene in the market when mere disappointment turns to unreasonable danger. Please see discussion in Rafferty, "Recovery in Tort for Purely Economic Loss: Contract Law on the

Retreat," 35 U.N.B.L.J. 111 (1986); S. Swanson, "The Citadel Survives . . . ," *supra*, at 158-164. Fears that tort law will "drown" warranty or contract law, if tort recovery is allowed for damage to the unreasonably dangerous product itself, have not been realized in the long experience of our international maritime neighbors or in the lower federal courts. Please see the exhaustive discussion of the Canadian and European experiences in *Norsk Pacific Steamship Co., Ltd. v. Canadian Nat'l R. Co.*, 1992 A.M.C. 1910 (S.Ct. Canada 1992) and J. Shepard, "The Murkey Waters of *Robins Dry Dock*," 60 Tul.L.R. 995 (1986).

In essence, where the issue is one of damage caused by an unreasonably dangerous, defective product, ". . . a buyer, commercial or otherwise, should not be forced to bargain for reasonable product safety." Note: *"East River Steamship Corp. . . . ,"* 61 Tul.L.R. at 1235. It is plainly absurd to assume that any party, commercial or consumer, when bargaining for a product would even consider accepting the risk that the product for which he will put down good money is not merely less valuable than expected, but actually unreasonably dangerous to persons and property. Thus, absent most unusual circumstances, a buyer could not have knowingly waived such liability in a contract of sale. A taxi cab driver may fairly be thought to contemplate differences in quality and price between a Hyundai and a Mercedes, but no one could be rationally presumed to bargain for a Mercedes that will spontaneously explode, even at a Hyundai price. Yet that is what the Fifth Circuit opinion submitted for review posits as federal maritime law.

III. THIS HONORABLE COURT'S SUPERVISORY POWERS OVER THE CIRCUIT COURTS OF APPEALS ARE INVOKED TO REMEDY THE FIFTH CIRCUIT'S ERRONEOUS DENIAL OF MCDERMOTT'S DUE PROCESS RIGHT TO TRY ITS DAMAGES TO THE PRODUCT ITSELF, THE SHEARLEG CRANE, TO A JURY

The panel opinion, in section V (Appendix pp. A-18-19), seriously erred in holding that McDermott did not preserve its claim to warranty recovery from River Don for damage to the Shearleg Crane. In fact, the Magistrate Judge ruled at the outset of trial that McDermott could not present its warranty-based claim against River Don for Crane damages. At page 59 (Appendix p. A-40), the Court ruled broadly, "It would be on the crane. I don't know that you would have anything on River Don. Mr. Lea: And so I can't mention that? The Court: No."

Further, at page 976 (Appendix p. A-41) (Mr. Moseley asked the Court,

> ". . . I understand the ruling of the Court was that with regards to the object itself, the crane, that we were prevented from putting on any issue of damages with regards to that because our only remedy was - was replacement of the hook? The Court: Damages; yes. . . . Mr. Moseley: I've only prepared damages with regards to the deck, and that's what I've got my witness here for, so any - any documents regarding the - crane itself, I have excluded from - from those - the documents which I had in a - a package and, in effect, those are reserved for whatever issues on appeal. . . ."

Review of plaintiff's pleadings, discussed at pages 976-983 (Appendix pp. A-41-48), shows that while the colloquy with the Court is difficult to decipher *in vacuo*, it certainly addressed the Court's rulings on *East River*'s limitation of tort recovery *and* his ruling precluding presentation of McDermott's case in warranty against River Don for Crane damages.

McDermott went on to ensure preservation of its claims for crane damages by proffering the evidence supporting said damages as Exhibit "P-351" (Appendix pp. A-43, 49-50). McDermott, having been precluded at the outset from presenting any evidence of its crane damages, could not, at the close of trial, ask the court to submit the issue to the jury.

Plaintiff submits that opposing counsel and the Magistrate Judge, through a per curiam can confirm what all understood at trial – that McDermott was wholly precluded from presenting any evidence of crane damages against River Don. Defendants' counsel certainly understood that he had won his battle to keep out all claims for crane damages as to both his clients, whether under tort or contract theories and defendants' counsel could hardly represent otherwise to the trial court or this Honorable Court, if asked today.

In short, the panel decision that McDermott did not preserve its claims for crane damages against River Don is based upon a misapprehension of the trial court's broad ruling precluding all presentation of crane damages, whether in tort or contract and the Court of Appeals' failure to note McDermott's proffer of evidence. Due process and the Seventh Amendment require remand

of this matter for presentation of the proffered crane damages, at least *per* River Don's affirmed liability.

CONCLUSION

This Honorable Court should grant this application for writ of certiorari to resolve the conflict among the federal Circuit Courts of Appeals, the disharmony in federal maritime law, and the injustice of the Fifth Circuit's credit to trial defendants of both settling defendants' *pro rata* share of liability and *pro tanto* credit for the settlement amount. A writ of certiorari should also issue to review the Fifth Circuit's denial of all recovery against AmClyde and recovery against River Don for damage to the Shearleg Crane, the product itself, when both defendants were found liable for physical damage to other property and catastrophic physical damage to the product itself, demonstrating an unreasonably dangerous defect, occurred and evidence thereof was admitted and/or proffered at trial. The Fifth Circuit Court of Appeals seriously erred in respect to the foregoing issues; therefore, McDermott, Inc. prays that this Honorable Court issue the writ of certiorari and after due proceedings had, reverse the rulings complained of and remand this matter to the trial court for reinstatement of its judgment against AmClyde and River Don in respect of damages to the SNAPPER deck and denial of a *pro tanto* credit for the

sling defendants' settlement, and for trial of McDermott's damages to the Shearleg crane.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2246

MCDERMOTT, INC.,

Plaintiff-Appellee,
Cross-Appellant,

versus

CLYDE IRON, ET AL.,

Defendants,

AmCLYDE, A Division of AMCA International, Inc., and RIVER DON CASTING LTD.,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Dec. 11, 1992)

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and HARMON,* District Judge.

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* District Judge of the Southern District of Texas, sitting by designation.

HIGGINBOTHAM, Circuit Judge:

This is a suit for damage to property resulting from a failure of a large crane on an offshore platform. AmClyde and River Don appeal from a judgment on the jury's verdict urging that AmClyde's contract with McDermott, and general maritime law, protect them from liability in warranty and tort in addition to the limits on tort liability under the *East River* doctrine and that, in any event, they are entitled to the credit of McDermott's settlement with others. McDermott cross-appeals attacking the application of *East River* and the denial of recovery for damage to the crane itself. We reverse the judgment against AmClyde. We conclude that River Don is liable to McDermott, but hold that River Don is entitled to full credit for McDermott's settlement.

I.

On January 10, 1986, McDermott contracted to purchase a 5,000 ton Shearleg crane designed and manufactured by AmClyde. The contract covered twenty-five pages and included several provisions purporting to limit potential liability. McDermott intended to use the crane to move the deck portion, the Snapper deck, of an offshore platform used in drilling for oil and natural gas. AmClyde designed the crane's hook. River Don was not a party to the McDermott-AmClyde contract but manufactured the hook under a subcontract with AmClyde.

On October 10, 1986, McDermott was using the crane to lift the approximately 3,950 ton Snapper deck. The crane was mounted aboard the vessel Intermac 600 in the Gulf of Mexico off the coast of Texas. As the crane lifted

the deck, one of the prongs on the hook and one of the slings holding the deck broke, and the deck fell onto the barge with serious damage to the crane and deck. This suit followed.

McDermott sued AmClyde, River Don, two manufacturers of the slings, and another sling supplier asserting tort and contract claims. AmClyde filed a third-party claim against Hudson Engineering, the McDermott subsidiary that designed the sling rigging arrangement used for the lift. AmClyde also counterclaimed for the cost of replacing the allegedly defective hook.

AmClyde and River Don moved for partial summary judgment arguing that AmClyde and McDermott agreed in the contract to restrict any tort and contract liability to repair or replacement and that under general maritime law there is no recovery for product damage and resulting economic loss under *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). The magistrate judge denied the motion.

On the eve of trial, McDermott settled with the three sling-related defendants for $1 million. AmClyde and River Don claimed a dollar-for-dollar credit for the $1 million settlement against any judgment against them, citing *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir. 1988). In his opening statement, counsel for McDermott told the jury that McDermott accepted responsibility for any part the slings played in causing the damage. The settlement documents were not formally executed until after the jury returned its verdict. That detail disclosed that the settlement agreement attributed one half of the

total settlement to crane damages and one half to deck damages.

Shortly after trial began, the magistrate judge, relying on *East River*, ruled that McDermott could not recover in tort for damage to the product itself, the crane and the hook, but that it could recover in tort for damage to the deck as "other property." At trial then, McDermott's claim for damages to the crane was limited to the remedies provided for in its contract with AmClyde.

The jury found the crane's hook to be defective, that the defect was one of materials or workmanship and misrepresentation, and that this defect was a producing cause of injury. The jury also found that AmClyde breached express and implied warranties that were a producing cause of injury. The jury awarded compensatory damages of $2.1 million for damage to the deck, attributing the cause of the accident 32% to AmClyde, 38% to River Don, 0% to Hudson Engineering and 30% to "McDermott/sling defendants." The jury was not asked to determine separately McDermott's contribution to the accident despite its assumption of any damage caused by the sling defendants. The court later denied AmClyde and River Don's request for a $1 million credit against the verdict and rendered judgment on the jury's verdict against AmClyde in the amount of $672,000.00 and against River Don in the amount of $798,000.00.[2]

AmClyde and River Don appeal, and McDermott cross-appeals. AmClyde and River Don first argue that

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[2] The jury also found in favor of McDermott on AmClyde's counterclaim. AmClyde does not appeal this determination.

recovery for damages to the deck cannot be supported by a breach of contract, because the parties disclaimed all warranties, except a limited replacement and repair warranty for materials and workmanship. Second, they contend that McDermott was not entitled to any recovery in tort for damage to the deck, because (1) the McDermott-AmClyde contract waived all tort liability as to AmClyde and River Don, and (2) *East River* precludes any tort claims for damage to *both* the crane and the deck. Third, AmClyde and River Don assert that the trial court should have granted their motions for directed verdict and judgment notwithstanding the verdict, because McDermott failed to prove causation. Finally, AmClyde and River Don claim an offset of the $1 million settlement under *Hernandez*, alternatively, that they are entitled to a new trial because of various erroneous rulings on questions of evidence.

McDermott contends that it is entitled to recover for damage to the crane as well as the deck. McDermott requests a remand for trial on the amount of damages to the crane only, contending that the jury has already determined the liability of AmClyde and River Don. McDermott argues that it should not be limited to the replacement of defective parts under the contract, because (1) AmClyde's refusal to replace the hook free of charge caused the limited warranty to fail of its essential purpose; (2) AmClyde made broad and undisclaimed warranties by incorporating technical specifications into the document; (3) the warranty was modified by later dealings between the parties and assurances from AmClyde that it would "stand behind its product"; (4) the replacement warranty applies only to AmClyde's

manufacture of the crane, not to its design and sale. Second, McDermott contends that *East River* does not bar recovery for damage to the crane, because other property, the deck, along with the crane was damaged. Third, McDermott argues that its claims against River Don should not be governed by the rule of *East River* because there was no contractual relationship directly between them. Finally, McDermott claims prejudgment interest and urges that the jury's verdict should be corrected to show that the jury allocated causation and not fault.

II.

We are convinced that the contract between McDermott and AmClyde controls AmClyde's liability to McDermott. It is urged that McDermott's recovery in warranty is limited to the replacement/repair warranty in the McDermott-AmClyde contract, and the contract precludes McDermott from recovering in tort. We agree and reverse the judgment against AmClyde. Although we conclude that River Don is not protected by the limited liability provisions in the contract between McDermott and AmClyde, and River Don is liable to McDermott, we find that River Don is entitled to a credit of McDermott's settlement with the sling defendants. We address AmClyde first, then River Don.

III.

The language of the contract is critical to McDermott's recovery against AmClyde in warranty, and we focus on Article XV[3]. The parties agree that we must look

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[3] ARTICLE XV - WARRANTY

A. The Seller warrants equipment of its own manufacture to be free from defects in materials and workmanship under normal use and service for a period of six (6) months after first use and not to exceed twelve (12) months after shipment or notification of readiness for shipment. This warranty extends only to the Buyer, and in no event shall the Seller be liable for property damage sustained by a person designated by the law of any jurisdiction as a third party beneficiary of this warranty or any other warranty held to survive the Seller's disclaimer. This warranty does not extend to normal wear and tear or to the equipment, materials, parts and accessories manufactured by others, and THE BUYER AGREES THAT IT MUST RELY SOLELY ON THE MANUFACTURER'S WARRANTIES APPLICABLE, AND THAT IT SHALL HAVE NO REMEDY AGAINST THE SELLER FOR BREACH OF A MANUFACTURER'S WARRANTY. This warranty shall be NULL AND VOID if any repairs, modifications or alterations are made to the equipment supplied hereunder during the warranty period by the Buyer or by others on his behalf without the prior written consent of the SELLER. THE WARRANTY DESCRIBED IN THIS PARAGRAPH SHALL BE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

B. Upon written notification received by the Seller within the above stated warranty period of any failure to conform to the above warranty, upon return

to the law of New York in interpreting this contract. Under New York law, these issues of contract interpretation are considered questions of law. *Maio v. Gardino*, 585 N.Y.S.2d 529, 530 (N.Y. App. Div. 1992); *Trustco Bank v. 11 North Pearl Assoc.*, 580 N.Y.S.2d 847, 848 (N.Y. Sup. Ct. 1992). Thus, our review is *de novo*.

A.

In Article XV, AmClyde warrants that equipment of its own manufacture will be free from defects in materials

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prepaid to the Seller of any nonconforming original part of component and upon inspection by the Seller to verify said nonconformity, the Seller shall repair or replace said original part or component without charge to the Buyer. The Seller shall ship the repaired or replaced part or component to the Buyer at the Buyer's expense. Correction of nonconformities, in the manner provided above, shall constitute fulfillment of all liabilities of the Seller to the Buyer or any other person whether based upon Contract, tort, strict liability or otherwise.

C. The remedies set forth herein are exclusive, without regard to whether any defect was discoverable or latent at the time of delivery of the apparatus to the Buyer. The essential purpose of this exclusive remedy shall be to provide the buyer with repair or replacement of parts or components that prove to be defective within the period and under the conditions previously set forth. This exclusive remedy shall not have failed of its essential purpose (as that term is used in the Uniform Commercial Code) provided the Seller remains willing to repair or replace defective part to components within a commercially reasonable time after it obtains actual knowledge of the existence of a particular defect.

and workmanship and that the exclusive remedy for the breach of this limited warranty will be repair or replacement of defective parts. Such agreed upon limits on remedy are generally valid. N.Y. U.C.C. Law § 2-719 (McKinney 1991)[4]; *Employers Ins. of Wausau v Suwannee River Spa Lines, Inc.*, 866 F.2d 752, 776 (5th Cir. 1989); *American Elec. Power Co. v. Westinghouse Elec.*, 418 F. Supp. 435, 452-53 (S.D.N.Y. 1976).

The jury found a defect in materials or workmanship, and therefore, a breach of this limited warranty. McDermott attempts to escape the restriction on remedy that it agreed to urging that this remedy "failed of its essential purpose."[5]

The policy behind the failure of essential purpose rule is to insure that the buyer has "at least minimum

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[4] N.Y. U.C.C. § 2-719(1) provides:

Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

[5] N.Y. U.C.C. § 2-719(2) provides:

Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

adequate remedies." U.C.C. § 2-719 Comment 1. Typically, a limited repair/replacement remedy fails of its essential purpose where (1) the "[s]eller is unsuccessful in repairing or replacing the defective part, regardless of good or bad faith; or (2) [t]here is unreasonable delay in repairing or replacing defective components." *Cayuga Harvester, Inc. v. Allis-Chalmers, Corp.*, 465 N.Y.S.2d 606, 613 (N.Y. App. Div. 1983). McDermott and AmClyde were aware of this rule, expressly addressing the doctrine in their contract. Article XV.C, provides: "[t]his exclusive remedy shall not have failed of its essential purpose . . . provided the Seller remains willing to repair or replace defective part to components within a commercially reasonable time after it obtains actual knowledge of the existence of a particular defect." *See* James J. White & Robert S. Summers, *Uniform Commercial Code* § 12-10 (3d ed. 1988) (stating that such a clause may give the seller greater protection).

McDermott argues that the limited remedy failed of its essential purpose, because AmClyde did not replace the crane hook free of charge. McDermott, with agreement of AmClyde and River Don, sent the hook to Packer Engineering for testing. Packer determined that the hook was defective, and McDermott demanded a replacement from AmClyde under the limited warranty. AmClyde responded that McDermott must first send them a purchase order. McDermott sent the purchase order, and AmClyde later sent a new hook, both parties expressly reserving their rights. AmClyde, as we noted, counterclaimed for the cost of the replacement hook, arguing that the hook was not defective, but failed at McDermott's

negligent hand. Based on the jury's verdict, the magistrate judge refused to order payment for the replacement hook.

McDermott's assertion that AmClyde did not replace the hook free of charge is apparently based on AmClyde's requirement of a purchase order and the contest of its obligation to provide a free replacement. McDermott received a new hook and at no cost. AmClyde never denied its obligation to replace a defective hook. It only denied that the hook was defective. It lost that argument and honored its obligation. We find no failure of purpose.[6]

B.

McDermott argues that in addition to the limited warranty in Article XV, the contract gained another express warranty by incorporating design specifications.[7]

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[6] McDermott further argues that the replacement warranty applies only to AmClyde's manufacturing of the crane, not to its design and sale. We find no merit to this contention. *See e.g., American Elec. Power Co. v. Westinghouse Corp.*, 418 F. Supp. 435 (S.D.N.Y. 1976) (court recognized the validity of a similar limitation of warranty/exclusive remedy provision where defendant's responsibility encompassed manufacturing, construction, and design); *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 631 F. Supp. 1123 (E.D. La. 1986), *aff'd*, 825 F.2d 925 (5th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988) (Avondale's limited warranty/exclusive remedy provision was enforced notwithstanding Avondale's involvement in manufacturing, construction, and design).

[7] ARTICLE I – SCOPE OF WORK

A. Provide one 5000 short ton shearleg derrick package for barge mounting in accordance with specification no.

The *Specifications* state that "[t]he crane when erected will be capable of lifting 5000 ST to a reach of 100 feet measured from the boom heel pin." McDermott argues that this language created an express warranty of the crane's lifting capacity or a "design warranty."

We decline this journey, however, because assuming there was a "design warranty," it was not breached. The jury found that the defect in the crane was one of materials or workmanship and misrepresentation and specifically *not* a defect in design.

McDermott also argues that AmClyde gave other express warranties after the parties executed the contract. McDermott relies on an exchange of letters between AmClyde vice president Michael J. Ucci and McDermott vice president W.L. Higgins. Mr. Ucci wrote in part:

> In the unlikely event the 5000 ST Shearleg Derrick being designed by Clyde does not perform according to the specification, Clyde would ensure that any deficiencies are corrected. Our track record in this area should speak for itself, but in addition I am giving you my personal assurance that we will stand behind our product.

Mr. Higgins responded:

> To the extent that you have expanded on the intent of the warranty of the 5000 ST Shearleg

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8506-12D/B REV 2 entitled "*Specifications for 5000 short ton shearleg derrick*" dated December 12, 1985 (EXHIBIT A) and as described in your Proposal dated December 9, 1985, *all of which are incorporated by this reference.*
(emphasis added).

> Derrick, we understand you to say that Clyde will correct any such deficiencies and will cooperate with McDermott to do so expeditiously and with a minimum of inconvenience and expense. This of course would conceptually include having the work done locally to avoid the time and expense of taking the equipment out of service and sending it to Duluth, Minnesota to correct deficiencies.
>
> We accept your personal assurance that Clyde will accept the additional warranty responsibility. McDermott trusts that the entire Clyde organization endorses the intent of your Comfort Letter and in particular, the notion that Clyde will stand behind its product.

McDermott argues that these letters created a new warranty.

An express warranty arises through "[a]ny affirmation of fact or promise by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." N.Y. U.C.C. § 2-313(1)(a) (McKinney 1991). We do not read these two letters to create a new or different warranty. Instead, Mr. Ucci only reaffirmed AmClyde's obligation to repair or replace any defective parts. Regardless, McDermott cannot overcome the contract's integration clause requiring a signed writing for its modification.[8] These provisions are specifically validated by

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[8] ARTICLE XXI – INTEGRATION

This document constitutes the entire Agreement between the parties. There are no understandings as to the subject matter of this Agreement other than as herein set forth. All previous communications

U.C.C. § 2-209(2), and a signed writing is required to modify or rescind them.[9] McDermott counters with a waiver argument. As circular as the notion may be, it is true that an integration clause can be waived, *see* U.C.C. § 2-209(4),[10] but we conclude that no waiver occurred.

McDermott states that both parties "as a normal course of conduct . . . regularly accommodated, modified, supplemented, and finalized important aspects of the Shearleg Crane and its warranted qualities after signing an initial contract document," and contends that this course of dealing constituted a waiver of the contract's modification requirement. The only case McDermott cites on this point is *Linear Corp. v. Standard Hardware Co.*, 423 So. 2d 966 (Fla. Dist. Ct. App. 1982). That case involved a contract for the sale of electronic security devices

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concerning the subject matter of this Agreement are hereby abrogated and withdrawn. This Agreement may not be modified except by a writing signed by both parties, and any printed terms and conditions submitted by either party during the course of this Agreement shall be of no force or effect, unless expressly agreed to the contrary in writing by both parties.

[9] N.Y. U.C.C. § 2-209(2) provides:
A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

[10] N.Y. U.C.C. § 2-209(4) provides:
Although an attempt at modification or recision does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

between a manufacturer and a wholesaler. The contract expressly stated that the goods were not purchased on consignment and could not be returned. The contract further required a signed writing to modify. The court found a waiver of this writing requirement and a new agreement to repurchase, concluding from a number of letters and telephone conversations that the seller had agreed to a return of unsold equipment.

In *Linear*, the new agreement involved a major change to the contract, the right to return the goods. The changes referred to by McDermott involved technical details that would have been difficult to spell out in the contract. More important, the McDermott-AmClyde contract authorized changes to "plans, designs, or specifications."[11] These changes did not modify the contract; they were contemplated by the parties, and the parties specifically provided for them in the contract. Relatedly and significantly, AmClyde and McDermott abided by the integration clause in performing the contract, executing a modification by a signed writing on one occasion. Representatives of McDermott and AmClyde executed a formal contract Addendum changing the indemnity/Hold

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[11] ARTICLE V – CHANGES

A. Buyer may, at any time by a written order, make changes within the general scope of this Contract in any one or more of the plans, designs, or specifications. If any such change causes an increase or decrease in the cost of or the time required for the performance of any part of this Contract, the Seller must advise Buyer Representative immediately and confirm to Buyer in writing within 5 working days. Nothing in this section shall excuse Seller from proceeding with the Contract as changed.

Harmless provisions. At the same time, the parties left the WARRANTY and INTEGRATION clauses untouched. If Mr. Ucci and Mr. Higgins intended to create a new warranty, they could have done so by complying with the contract's integration clause.

C.

The jury found that AmClyde breached an implied warranty of the hook. AmClyde argues, however, and we agree that this finding has no legal consequence. The McDermott-AmClyde contract waived all implied warranties. N.Y. U.C.C. Law § 2-316(2) (McKinney 1991).[12] Moreover, McDermott admitted that the contract waived all implied warranties under Fed. R. Civ. P. 36(b). AmClyde asked McDermott to admit or deny "[t]hat the Contract for Supply of 5,000 Short Ton Shearleg Derrick between McDermott and Clyde Iron dated January 10, 1986, in Article XV(A), waived any implied warranty." McDermott replied "Admitted." The magistrate should have ignored the jury's answer to this question. *American*

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[12] N.Y. U.C.C. § 2-316(2) provides:
Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

Automobile Ass'n. v. AAA Legal Clinic, 930 F.2d 1117, 1120 (5th Cir. 1991).

IV.

This brings us to McDermott's tort claims against AmClyde. Article XV of the McDermott-AmClyde contract provides that: "Correction of nonconformities, in the manner provided above, shall constitute fulfillment of all liabilities of the Seller to the Buyer or any other person *whether based upon Contract, tort, strict liability or otherwise.*" (emphasis added). AmClyde argues that this provision protects it from liability to McDermott in tort. We agree.

Contractual provisions waiving negligence and strict liability claims are enforceable under New York law. *See Laudisio v. Amoco Oil Co.*, 437 N.Y.S.2d 502, 504 (N.Y. Sup. Ct. 1981) (negligence); *Velez v. Craine & Clark Lumber Corp.* 350 N.Y.S.2d 617, 623 (N.Y. 1973) (strict liability). Contractual waivers of liability are subject to close judicial scrutiny and "it must appear plainly and precisely that the limitation extends to negligence or other fault of the party attempting to shed his ordinary responsibility." *Howard v. Handler Bros. & Winell*, 107 N.Y.S.2d 749, 752 (N.Y. App. Div. 1951), *aff'd*, 106 N.E.2d 67 (N.Y. 1952); *Gross v. Sweet*, 424 N.Y.S.2d 365, 368 (N.Y. 1979). McDermott does not attack the exculpatory provision in the McDermott-AmClyde contract as being vague or ambiguous. The provision is precise. It specifically mentions "tort" and "strict liability," terms familiar to sophisticated business entities such as these. *See Gross*, 424 N.Y.S.2d at 368 (noting that broadly worded clauses may be sufficient

where sophisticated business entities are involved). Moreover, similar clauses are common in commercial markets. *See e.g. Nicor Supply Ships Assocs. v. General Motors*, 876 F.2d 501, 504 (5th Cir. 1989); *Arkwright-Boston Mfrs. Mutual Ins. Co. v. Westinghouse Elec. Corp.*, 844 F.2d 1174, 1181 n.15 (5th Cir. 1988); *American Electric*, 418 F. Supp. at 452 n.25.[13]

We hold that McDermott has no claims against AmClyde, except for breach of the limited warranty in their contract. We reverse this portion of the judgment of the district court.[14]

V.

Turning to River Don, McDermott's contention that it should have been allowed to proceed against River Don for a breach of warranty is unclear. On one hand, McDermott states it "was *not* allowed to proceed in contract against River Don for any damages but was restricted to tort damages by River Don to the deck section alone," and "[t]he court, inexplicably, would not allow any evidence of contract remedies that River Don would owe to McDermott, Inc., directly or as third party beneficiary, per Article XV." On the other hand, McDermott says "the evidence adduced at trial demonstrated that River Don made express and implied warranties regarding the Hook

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[13] The exculpatory provision's preclusion of liability in tort bars McDermott's misrepresentation claim as well. Therefore, the jury's finding of a misrepresentation defect was of no legal significance.

[14] Because we reverse the judgment against AmClyde, we need not address AmClyde's other assignments of error.

which were communicated to McDermott with the expectation that these representations would be relied upon." Regardless, McDermott has not preserved this issue for appeal.

The magistrate judge did not rule on McDermott's contract claim against River Don. The magistrate relied upon *East River* in ruling that McDermott could recover in tort for the damage to the deck but not to the crane. Without objection, the district judge submitted only McDermott's warranty claims to the jury.

VI.

River Don argues that the exculpatory provision in the McDermott-AmClyde contract protects it as well as AmClyde from liability in tort. River Don relies on *Aeronaves De Mexico, S.A. v. McDonnell Douglas*, 677 F.2d 771 (9th Cir. 1982). In that case, an airplane's landing gear failed. Aeromexico sued the manufacturer of the plane, McDonnell Douglas, and the subcontractor who manufactured the landing gear assembly, Menasco. *Id.* at 772. The contract between Aeromexico and McDonnell Douglas contained a warranty provision, similar to that in the McDermott-AmClyde contract, barring a negligence action against McDonnell Douglas. *Id.* at 773. Aeromexico did not contest the validity of that provision but on appeal argued that the exculpatory provision did not bar its suit against Menasco, because Aeromexico and Menasco were not in privity. The court rejected this contention, concluding that recovery by Aeromexico from Menasco would be a windfall. The court relied on the fact that if Aeromexico were allowed to sue Menasco directly,

Menasco could file a third party claim against McDonnell Douglas. *Id.* In fact, the district court found that the contract between McDonnell Douglas and Menasco permitted such a claim. *Id.* at n.4. The liability would be visited upon McDonnell Douglas, "thus nullifying the contractual allocation of risks" between McDonnell Douglas and Aeromexico. *Id.* at 773.

We decline to apply the rationale of *Aeronaves de Mexico*. We are mindful of the fact that we must apply New York law to interpret the McDermott-AmClyde contract. We are not persuaded that New York would here abandon the rule of privity. If River Don had a claim against AmClyde and thus could shift ultimate liability to AmClyde, this fact would not persuade us that McDermott is barred from recovering against River Don. If AmClyde wanted to prevent River Don from shifting liability, AmClyde could have sought this protection from River Don in their subcontract. AmClyde only warranted equipment of its own manufacture. The contract did not preclude McDermott from suing other manufacturers.[15]

River Don's tort liability turns then on the *East River* doctrine. In *East River Steamship Corp. v. Transamerica Delaval. Inc.*, 476 U.S. 858, 871 (1986), the Supreme Court held that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself."

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[15] Article XV provides in part: THE BUYER AGREES THAT IT MUST RELY SOLELY ON THE MANUFACTURER'S WARRANTIES APPLICABLE, AND THAT IT SHALL HAVE NO REMEDY AGAINST THE SELLER FOR BREACH OF A MANUFACTURER'S WARRANTY.

The Court reasoned that when the only damage is economic loss to the product itself, the purchaser has simply lost the benefit of its contractual bargain and should be limited to its contractual warranty remedies. *Id.* at 872-876.

McDermott argues that *East River* does not shield River Don from tort liability, because River Don is not a party to the contract between McDermott and AmClyde. In *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925, 929 (5th Cir. 1987), we held that under *East River* there is "no rational reason to give the buyer greater rights to recover economic losses for a defect in the product because the component is designed, constructed, or furnished by someone other than the final manufacturer." Allowing such a recovery would "undermine the objective of *East River* that the parties receive the benefit of their bargain." *Id.; see also Nathaniel Shipping, Inc. v. General Elec. Co.*, 920 F.2d 1256, 1263-64, *modified*, 932 F.2d 366 (5th Cir. 1991). Thus, *East River* applies to River Don.

East River applies when the action is for damage to the product itself and not for damage to "other property." *Shipco*, 825 F.2d at 929. Therefore, the issue in this case is whether the deck is "other property" so as to escape *East River*'s bar to recovery in tort. We ask "what is the object of the contract or bargain that governs the rights of the parties?" *Id.* at 928; *see also Petroleum Helicopters, Inc. v. Avco Corp.*, 930 F.2d 389, 393 n.9 (5th Cir. 1991); *Nicor Supply Ships Assocs. v. General Motors*, 876 F.2d 501, 505 (5th Cir. 1989).

River Don argues that the deck is not "other property," because McDermott owns the deck as well as the

crane, pointing to *Nicor*. Nicor Supply Ships chartered its vessel to Digicon. Digicon then installed structures and equipment on the vessel for use during the term of the charter. A fire damaged the ship and Digicon's equipment. Nicor and Digicon sued several parties. 876 F.2d at 502-03. *East River* barred Nicor's claim for damage to the ship. Digicon's claim for damage to its equipment survived "[b]ecause these items were not part of the contract under which the vessel was sold." *Id.* at 506. The decision did not turn on Digicon's ownership of the damaged equipment. The object of the McDermott-AmClyde contract was the manufacture, design, and sale of the crane, and that is the relevant inquiry. The deck was not the object of the sales contract rather the deck is "other property."

McDermott argues that River Don is liable for damage to the crane, because when a plaintiff suffers damage to "other property", *East River* allows recovery of *all* damages. *East River* allows recovery for damage to other property, 476 U.S. at 875-76, but when there is damage to other property, recovery for the loss to the product itself is still in contract and not tort. We emphasized this point in *Nicor*. Speaking of Digicon's recovery in tort, we stated

> [h]aving sustained "physical injury to a proprietary interest," Digicon may recover for economic loss as well, *but its recovery for loss of profits is limited to losses resulting from its inability to use the "other property" it placed on the vessel as a result of the casualty*. Digicon is not entitled to recover for its loss of profits resulting from its inability to use the vessel itself or for its inability to use the "other property" if that resulted solely from the disability of the vessel itself.

876 F.2d at 506 (emphasis added). Therefore, this contention is without merit.[16] The trial court correctly applied *East River* to allow McDermott's recovery against River Don for damage to the deck, but not the crane.

VII.

River Don argues that McDermott failed to prove causation. We review the evidence in the light most favorable to McDermott. *Martin v. American Petrofina, Inc.*, 779 F.2d 250 (5th Cir. 1985). The verdict stands if reasonable jurors could reach different conclusions. *Id.* We decline to disturb the verdict.

At trial, McDermott and river Don offered different theories of causation. McDermott argued that the hook was defective, and the defect caused the hook to break. River Don conceded that the hook contained flaws but argued that McDermott's use of a right hand to left hand cable laid sling arrangement caused the hook to break. That is, McDermott's sling arrangement allowed the slings to rotate during the lift. This rotation caused the slings to break first, putting more stress on the hook than it was designed to handle.

McDermott offered the testimony of Dr. Kenneth Packer, an expert in foundry practice, welding, and metallurgy. Packer testified that the hook contained a flaw that caused the hook to fail; that the hook broke first. On

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[16] McDermott also attempts to circumvent *East River* by arguing that the decision is inapplicable to the crane a product that is unreasonably dangerous. The Supreme Court rejected this distinction *East River*. 476 U.S. at 869-70.

cross-examination, Dr. Packer testified that the hook was flawed when it left River Don's foundry.

River Don argues that Dr. Packer failed to substantiate McDermott's theory of causation and could not discount other plausible theories, namely that the slings broke first. River Don refers to the fact that the crane, with the flaw, lifted objects weighing as much or more than the deck before the accident and in fact successfully lifted the deck on one occasion. Therefore, River Don argues that the flaw could not have caused the hook to fail.

We find that McDermott presented sufficient evidence for the jury to conclude that hook failure caused to deck to fall. *See Brown v. Parker-Hannifin Corp.*, 919 F.2d 308, 312 (5th Cir. 1990) ("To establish causation, [plaintiff] need not rule out every conceivable explanation for the failure . . . "). First, the jury could have reasonably inferred that the flaw in the hook caused it to break. The jury could have considered the presence of the flaw in earlier lifts in evaluating the likelihood that the hook caused the accident, but the presence of the flaw from the beginning does not eliminate it as a cause of the accident. Second, Dr. Packer was not the only witness to testify that the hook failed first. Steven Whitcomb, a project manager at Hudson Engineering, prepared a report on the cause of the accident. The report was based on a computer analysis of the two theories of causation, hook failure and sling failure. He delivered this report in a presentation to AmClyde. At trial, he testified about his report to AmClyde in which he concluded that the hook failed first

and was the cause of the accident. McDermott also presented eye witnesses to the accident who testified that the hook broke first.

VIII.

River Don contends that any judgment rendered against it must be offset by the $1 million settlement between McDermott and the sling defendants under *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir. 1988). *Hernandez* held that a maritime plaintiff "is entitled to receive a full damage award less any amount he recovered in a settlement with third-party defendants." *Id.* at 591; *see also Constructores Tecnicos v. Sea-Land Serv., Inc.*, 945 F.2d 841 (5th Cir. 1991); *Rollins v. Cenac Towing Co.*, 938 F.2d 599 (5th Cir. 1991); *Myers v. Griffin-Alexander Drilling Co.*, 910 F.2d 1252 (5th Cir. 1990). This rule of setoff "ensure[s] that the plaintiff does not recover more than the damages determined at trial." *Constructores*, 945 F.2d at 850.

McDermott argues that *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), states the law of this circuit and does not entitle River Don to a dollar-for-dollar credit. A recent panel of this court suggested that it is unclear whether *Leger* or *Hernandez* provides the rule of settlement credit in this circuit. *See Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 835 (5th Cir. 1992). Judge Brown wrote a concurring opinion to emphasize the need to resolve this conflict en banc. *Id.* at 836. However, we think that *Hernandez* is the law of this circuit. The panel in *Myers* attempted to make this point clear:

> we read *Hernandez* as adopting the reasoning of the Eleventh Circuit opinion in *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), which declined to follow *Leger* on grounds that *Leger* was inconsistent with *Edmonds v. Compagnie General Transatlantique*, 443 U.S. 256, 99 S. Ct 2753, 61 L. Ed. 2d 521 (1979).

Myers, 910 F.2d at 1256.

Until the Eleventh Circuit decided *Self*, *Leger* was binding precedent in that circuit as well as our own. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down before the close of business on September 30, 1981). In *Self*, the Eleventh Circuit decided that *Leger*'s pro rata approach to settlement credit was inconsistent with the Supreme Court's opinion in *Edmonds*. Thus, in *Self*, the Eleventh Circuit returned to the pro tanto or dollar-for-dollar approach to credit set out in our earlier opinion in *Billiot v. Seward Seacraft*, 382 F.2d 662, 664-65 (5th Cir. 1967). We had abandoned *Billiot in Leger* based on *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). Today, there is no doubt in the Eleventh Circuit that *Self* overruled *Leger*. *Great Lakes Dredge & Dock Co. v. Tanker*, 957 F.2d 1575, 1580 (1992).

In *Hernandez*, we explicitly adopted the Eleventh Circuit's reasoning in *Self*. Therefore, we also overruled *Leger* as precedent in this circuit and returned to the rule in *Billiot*. *See, e.g., Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991) (a panel may ignore the decision of a prior panel in the event of a superseding decision by the Supreme Court). Since *Hernandez*, we have applied its

dollar-for-dollar approach. *See Constructores*, 945 F.2d 841; *Rollins*, 938 F.2d 599; *Myers*, 910 F.2d 1252. Two recent panels cited *Leger*, suggesting that it remains good law. *See Empresa Lineas Maritimas v. Schichau-Unterweser*, 955 F.2d 368, 374 (5th Cir. 1992); *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 346 (5th Cir. 1991). However, they did not apply the *Leger* approach. We continue to apply *Hernandez* in calculating settlement credit.

The district court refused to allow any set-off, concluding that McDermott would not be paid for more than its injury, because *East River* left it otherwise uncompensated for the damage to the crane. This is true, but not relevant. The jury determined that McDermott's total loss for the damage to the deck was $2.1 million, $1.47 million after a reduction of 30% for the responsibility attributed to McDermott/sling defendants. $1.47 million is McDermott's "full damage award." It cannot recover more. We must then deduct the *Hernandez* credit.

This requires us to address McDermott's post-trial revelation that half of the settlement was allocated to the crane and half to the deck. McDermott urges that because River Don is only liable for the deck, it is only entitled to credit for that part of the settlement covering damage to the deck. River Don urges us not to consider this allocation, because it was made after trial, it was not a party to the agreement and the settlement is not in the record.

We see little reason to give effect to this allocation and strong reasons not to do so. Where defendants are potentially liable for the same damages and less than all defendants settle, uncertainty of the effect upon the non-settling defendants does little to facilitate settlement and

may well frustrate the single recovery rule itself. A plaintiff should not be able to wait for the jury's verdict to allocate the settlement in a way that reduces the remaining defendants' credit. *See King Cotton, Ltd. v. Powers*, 409 S.E.2d 67, 70 (Ga. Ct. App. 1991); *see also Alexander v. Seaquest Inc.*, 575 So. 2d 765, 766 (Fla. Dist. Ct. App. 1991) (apportionment of settlement comes too late if done after jury verdict, because nonsettling tortfeasors lose the right to settle); *Dionese v. City of West Palm Beach*, 500 So. 2d 1347, 1351 (Fla. 1987) (disclosure of settlement's terms may lead the non-settling defendant to settle instead of going to trial).

Rejecting McDermott's allocation of one-half to the crane and one-half to the deck leaves two options. We could apportion the settlement ourselves, or use the entire sum in calculating any credit due River Don. We decline the first option. *See Lendvest Mortgage, Inc. v. De Armond*, 123 B.R. 623, 624-25 (Bankr. N.D. Cal. 1991) (rather than attempt to allocate a settlement, a court should offset the entire amount). There is no evidence in the record concerning McDermott's damages to the crane. A remand to the trial court offers no solution.

Including the full amount of McDermott's settlement in calculating any credit due river Don is the best solution. *See U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1262 (10th Cir. 1988) (where nonsettling defendants are not privy to settlement negotiations, burden shifts to plaintiff to show that settlement did not represent common damages); *see also Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197 (10th Cir. 1988) ("If [plaintiff] wanted to have any particular application of its settlement with the settling defendants toward [nonsettling

defendant's] liability, it should have specifically stipulated in the settlement documents what allocations of damages were applicable to each cause of action."); *but see Force v. Director, OWCP, Dept. of Labor*, 938 F.2d 981, 985 (9th Cir. 1991) (defendant-employer bears burden of proving settlement allocation, because the LHWCA's policy "of compensating employees for their injuries requires that 'all doubtful questions of fact be resolved in favor of the injured employee' ").

McDermott had a claim against the sling defendants for damage to the crane and the $1 million payment obtained a release of that claim as well as the claim for damage to the deck. It was McDermott's burden to demonstrate that its jury award did not exceed its right to full compensation for a particular injury. McDermott has not met its burden of demonstrating that the proceeds of the settlement with the sling defendants were for damage to the crane and not the deck. We hold that the entire $1 million should be included in calculating any credit due River Don. *See U.S. Industries*, 854 F.2d at 1262-63; *Hess Oil*, 861 F.2d at 1209; *Lendvest Mortgage*, 123 B.R. at 625. *Alexander*, 575 So. 2d at 765; *King Cotton*, 409 S.E.2d at 70; *Dionese*, 500 So.2d at 1349.[17]

Applying *Hernandez*, McDermott's full damage award is $1.47 million ($2.1 million jury verdict less 30% attributed to McDermott/sling defendants). We then deduct the $1 million received in settlement to reach

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[17] Our conclusion that River Don is entitled to credit for McDermott's settlement makes consideration of River Don's alternative argument for a new trial based on evidentiary rulings unnecessary.

$470,000. By the jury's finding, River Don is liable to McDermott for its portion of McDermott's loss (38% of $2.1 million or $798,000). However, McDermott is only entitled to recover an additional $470,000 from any defendant. We therefore modify the judgment against River Don for $798,000, and enter judgment against River Don and in favor of McDermott in the amount of $470,000.

It does not follow that McDermott's decision at trial to assume the fault of the sling defendants was unwise. To the contrary, this tactical move made more difficult any effort of River Don and AmClyde to lay any fault on the absent sling defendants. But for this move the jury may well have been persuaded that the sling defendants were liable for more than 30% and the other defendants, including River Don for less. Seen in the light of these realities of trial, this result makes sense.

IX.

McDermott claims pre-judgment interest. The jury awarded no interest. McDermott does not challenge the jury instruction,[18] which tracked the law of this circuit.[19]

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[18] The jury was charged as follows:
In admiralty cases, the award of pre-judgment interest from the date of the loss is the rule rather than the exception. The decision to deny pre-judgment interest must be based on the existence of peculiar circumstances because pre-judgment interest is awarded as a compensation for a wrong done. It is your responsibility to determine whether to award McDermott, Inc. pre-judgment interest. If you determine that the – that the Plaintiff is entitled to pre-judgment interest; that is, interest from the date of the loss until the date you render your verdict, you must determine the rate at which the interest will be calculated. The

circumstances which may justify denial of an award for pre-judgment interest are as follows: A genuine dispute over a good faith claim exists in a mutual fault situation – mutual fault setting; the damages awarded are substantially less than the amount claimed by the Plaintiff; the Plaintiff's contributory negligence is to such a magnitude as to make and award of pre-judgment interest inequitable.

[19] McDermott refers us to Texas, New York, and Louisiana law; however, pre-judgment interest on a maritime tort claim is governed by general maritime law. *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951, 955 (5th Cir. 1984); *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1053 (5th Cir. 1973).

See Orduna S.A. v. Zen-Noh Grain Corp., 913 F.2d 1149, 1157 (5th Cir. 1990) (noting the reasons for denying pre-judgment interest). Rather, McDermott argues that the circumstances justifying denial of pre-judgment interest were not present in this case. We disagree.

The jury could have found there was a genuine dispute over a good faith claim in a mutual fault setting. "Our cases have consistently upheld denials of prejudgment interest in cases of apportioned fault." *Inland Oil and Transport Co. v. Ark-White Towing Co.*, 696 F.2d 321, 328 (5th Cir. 1983). In this case, the jury assessed responsibility 32% to AmClyde, 38% to River Don, and 30% to McDermott/Sling defendants. *See id.* (upholding a denial of pre-judgment interest where the plaintiff was found to be 25% at fault).

X.

Finally, McDermott asks us to correct the judgment to show that the jury apportioned causation and not fault. The judgment paraphrased the jury verdict as follows:

"thirty percent (30%) *fault* allocated to plaintiff, McDermott, Inc., thirty-two percent (32%) *fault* allocated to AmClyde, a Unit of AMCA International Corporation, and thirty-eight percent (38%) *fault* allocated to River Don Castings, Ltd." (emphasis added). McDermott contends that the judgment incorrectly paraphrased the jury's verdict which allocated *causation* and not fault. Interrogatory #5 asked:

> You have been instructed that the failure of the sling at a load less than its rated minimum breaking strength is a cause of damage to the deck and crane. If you have also answered interrogatories 1 and 2 "yes," please state what proportion or percentage of plaintiff's damages you find from a preponderance of the evidence to have been legally *caused by the fault* of the respective parties?

We agree that in answering this interrogatory the jury determined the percentage of injury caused by each defendant.

REVERSED in part and AFFIRMED as modified in part.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2246

McDERMOTT, INC.,

Plaintiff-Appellee,
Cross-Appellant,

versus

CLYDE IRON, ET AL.,

Defendants,

RIVER DON CASTING LTD.,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Filed Jan. 25, 1993)

(Opinion 12/11/92, 5 Cir., ___, ___ F.2d ___)
(January 25, 1993)

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and HARMON,* District Judge.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having

requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

• District Judge of the Southern District of Texas sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

McDERMOTT, INC., Plaintiff	§	
v.	§	C.A. H-88-2429
CLYDE IRON, ET AL., Defendants	§	

JURY INTERROGATORIES

1. Do you find from a preponderance of the evidence that the hook was defective in any of the ways alleged?

ANSWER: Yes X or No _

December 7, 1990 (DATE) /s/ Illegible (FOREPERSON)

If you answered "Yes," go to Interrogatory Number 2.

If you answered "No," go to Interrogatory Number 12.

2. If the answer to Interrogatory Number 1 was "Yes," do you find by a preponderance of the evidence that the defect was a legal cause of damages?

ANSWER: Yes X or No _

December 7, 1990 (DATE) /s/ Illegible (FOREPERSON)

If you answered "Yes," go to Interrogatory Number 3.

3. If the answers to Interrogatories Number 1 and 2 were yes, do you find from a preponderance of the evidence that the defect was:

(a) One of design?

ANSWER: Yes _ or No X

(b) One of materials or workmanship?

ANSWER: Yes X or No _

(c) A failure to warn?

ANSWER: Yes _ or No X

(d) One of misrepresentation?

ANSWER: Yes X or No _

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

4. If the defect was one of materials or workmanship, do you find by a preponderance of the evidence that the negligence or fault of any of the following was a cause of the defect:

(a) River Don Casting?

ANSWER: Yes X or No _

(b) AmClyde?

ANSWER: Yes X or No _

(c) McDermott, Inc.?

ANSWER: Yes _ or No X

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

5. You have been instructed that the failure of the sling at a load less than its rated minimum breaking strength is a cause of damage to the deck and crane. If you have also answered interrogatories 1 and 2 "yes," please state what proportion or percentage of plaintiff's damages you find from a preponderance of the evidence to have been legally caused by the fault of the respective parties?

Answer in terms of percentages:

AmClyde	32	%
River Don Casting	38	%
McDermott/Sling defendants	30	%
Hudson Engineering	0	%
TOTAL	100	%

(NOTE: The total should equal 100%)

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

6. Do you find by a preponderance of the evidence that AmClyde breached any express warranties in addition to the manufacturing warranty found in the original contract in regard to the hook as alleged by plaintiff?

ANSWER: Yes X or No _

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

7. If so, do you find that AmClyde's breach of these express warranties was a producing cause of the damages suffered by McDermott, Inc.?

ANSWER: Yes X or No _

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

8. Do you find by a preponderance of the evidence that AmClyde breached any implied warranties in regard to the hook as alleged by plaintiff.

ANSWER: Yes X or No _

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

9. If so, do you find that AmClyde's breach of implied warranty was a producing cause of the damages suffered by McDermott, Inc.?

ANSWER: Yes X or No _

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

10. What sum, in dollars, without regard to the percentages of fault of any party, do you find from a preponderance of the evidence, is required to compensate McDermott, Inc., for the damages to the deck as a result of this accident?

$ 2,100,000.00

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

11. Do you find by a preponderance of the evidence that McDermott, Inc., is entitled to pre-judgment interest?

ANSWER: Yes _ or No X

If so, what % interest?

%_____

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

12. Do you find by a preponderance of the evidence that AmClyde is entitled to be compensated for the replacement of the hook and associated charges.

ANSWER: Yes _ or No X

December 7, 1990 /s/ Illegible
(DATE) (FOREPERSON)

If you answered "yes," go to Interrogatory Number 13.

13. State what sum, in dollars, without regard to the percentage of fault of any party, do you find from a preponderance of the evidence, is required to compensate AmClyde for the replacement of the hook?

$ _____

_____ _____
(DATE) (FOREPERSON)

* * *

[p. 59] **MR. LEA:** We maintain that River Don does not get benefit of ***East River*** because we don't have any contractual relationship with them. That's different now than Clyde. I understand if we have a contractual relationship with Clyde according to your ruling, if the contract says it, that's all we get. But we don't have anything with River Don and the effect of holding that we're limited to a non-existent contract is to give somebody with whom you don't have a contract absolutely (sic) immunity when they go offshore. And I – I feel strongly that's not the law.

THE COURT: I may be wrong on it, but that – as I see it, that's –

MR. LEA: So it – you're ruling that way on River Don, too, just for clarification purposes? Not just Clyde with whom we have –

THE COURT: It would be on the crane. I don't know that you would have anything on River Don.

MR. LEA: And so I can't mention that?

THE COURT: No.

MR. LEA: Okay. I will structure my – my arguments accordingly.

THE COURT: But now I think River Don will certainly be liable as far as that snapper deck goes.

MR. LEA: All right, sir.

THE COURT: I think you're getting –

* * *

[p. 976] **MR. MOSELEY:** Let's wait till we have –

MR. O'BRIEN: If Dr. Packer comes to testify, then we'll –

MR. COUHIG: Then we'll raise the issues.

MR. MOSELEY: Yeah. I mean, that – that's –

MR. COUHIG: That's fine.

MR. MOSELEY: – see whether we have a problem. Now, on – your Honor, just to make it clear because something that Mr. O'Brien – I understand the ruling of the Court was that with regards to the object itself, the crane, that we were prevented from putting on any issue of damages with regards to that because our only remedy was – was replacement of the hook?

THE COURT: Damages; yes. I think – I think that's exactly – I think East River just says that as far as that crane goes, that is the unit damage in itself, and I think that –

MR. MOSELEY: I've only prepared damages with regards to the deck, and that's what I've got my witness here for, so any – any documents regarding the – the crane itself, I have excluded from – from those – the documents which I had in a – a package and, in effect, those are reserved for whatever issues on appeal should we need them, I suppose, all the things regarding cranes. I just wanted to make that sure that we're only putting the deck claim forward at this point.

THE COURT: Well, now, I –

MR. MOSELEY: It's my under –

[p. 977] **THE COURT:** If you, for – I mean, you may be able to get in what it cost to recast the hook; I don't know, if they've charged you for it.

MR. MOSELEY: They charged; we didn't pay them.

THE COURT: Oh, well, if you had paid them and you have got your hook, well, you know, I –

MR. MOSELEY: Right. Our claims was that, you know, if you're – in effect, if you're correct on East River then we don't have that, and that's what you've ruled. If –

THE COURT: Well, I think – you know, and even that – even that case – the Connecticut case that you – I read both of those. I read that one and then the other case that – there's a Nicor (sp.ph.) case or whatever it is. I think that Nicor – Judge Rubin in that case goes through and he – he mentioned that concern I had on that Dreyfus case and the Oxy case, talking about cargo and this, that, and the other.

MR. MOSELEY: And he – And he –

THE COURT: And he said, look, that's all – That's all dicta anyway. I didn't see that it was dicta, but –

MR. MOSELEY: Yeah, he called it dicta.

THE COURT: Judge Rubin says that it's dicta, and so he's say – if there is other – if there is other property and it doesn't say – it doesn't talk about ownership of that other property. I understand how the defendants are trying to distinguish that, but –

[p. 978] **MR. MOSELEY:** Your honor, I –

THE COURT: – to me, that deck is other property; if other property is going to have any meaning.

MR. MOSELEY: Yeah, I – I have no doubt about that, that part of the ruling. I was only talking about the part where it limited our contractual remedy –

THE COURT: I think East River limits your contractual remedies and –

MR. MOSELEY: That's the reason I'm not putting –

THE COURT: Now, the Connecticut case, you know, it's true enough, when they had that guy blown away or – or – well, in fact, they had a bunch of them killed in that, I think fourteen or fifteen, and they let them – they – I agree, they –

MR. MOSELEY: All I'm saying, Your Honor, I disagree because of the contractual issues as I put in my memorandum, and that breach of contract, failure of (indiscernible) purpose, and those other ones would abrogate that, and that's all in my Brief. All I'm saying now is as a result of your ruling, I'm only putting on damages with regards to the deck and should we prevail on the other issues, those documents are available to the Court.

THE COURT: Well, I think that's –

MR. COUHIG: Judge, lest I be chastised upon my return home, I have there this weekend with the assistance of others, a memorandum in opposition to Plaintiff's Motion to Reconsider [p. 979] even though it's already been denied, I'd like to file it in the record.

THE COURT: Well, is there anything in there that might make me reconsider – reconsider what now?

MR. COUHIG: He wanted to come back and – and try and get all the claims, and this is just to support your ruling.

THE COURT: Oh, this supports my ruling?

MR. COUHIG: Yes, sir.

THE COURT: Oh –

MR. COUHIG: So it's very favorable.

THE COURT: Very well.

MR. COUHIG: Now, Judge, having given you with one hand, I take away with the other. We have, and I delivered to you, a letter that contains copies of the Briefs filed in the Oxy producer and Employees Insurance of Wausau case.

THE COURT: Well, that is the Oxy producer –

MR. COUHIG: I'm sorry. I – I'm reading two things at once.

THE COURT: You're talking about the Dreyfus case?

MR. COUHIG: No, sir. I'm talking about Oxy producer. The memorandum of – of – or the appellee Brief of the plaintiff and the appellant's Brief of the defendants, the reason we give you that, sir, is I think that the discussion on other property are relevant to that which we have – have argued already. Rockne, I don't know where your copies are. I –

[p. 980] **MR. MOSELEY:** The only – The only thing I would object to again is since that was made no part of the decision that it is just pure argument, and the decision does not address that particular issue.

THE COURT: Well, Judge – Judge Rubin in this – I think it's the Nicor case –

MR. MOSELEY: Nicor, Judge.

THE COURT: – which you cited to me that I promptly went out and read says all that discussion is dicta anyway. You're talking about the – the – the distinguishes being cargo from –

MR. COUHIG: Yes, sir.

MR. SPEAKER: And we – we cited that to the Court.

MR. COUHIG: As you will recall, I felt that in fairness to you I should do it although –

MR. MOSELEY: Your Honor –

MR. COUHIG: I think when you get into the philosophy and we don't need to argue it although it is an interesting area of law, the philosophy of commercial relationships, not just in maritime law but outside of maritime law, it is obvious that what the Court's are saying is strike your commercial bargain and go after that.

THE COURT: It's – If it is that product only, and then if they say you have other property – what's other property to me?

[p. 981] **MR. COUHIG:** You and I have had our disagree –

THE COURT: You say it means property owned by someone else –

MR. COUHIG: Yes –

MR. MOSELEY: Your honor, in fairness –

MR. COUHIG: Someone who's not a party to the commercial relationship.

MR. MOSELEY: In fairness to Mr. Couhig, I think in many degrees, he supports part of his argument where he talked about other property in – in Oxy producer which –

THE COURT: Oh, was Oxy producer your case?

MR. SPEAKER: Yes, Judge

THE COURT: Oh, I didn't realize that was your case then.

MR. MOSELEY: It wasn't – It wasn't the fact though addressed in the decision Oxy producer. There was always some question to, at least in mind in reading Oxy producer because it was obviously that there was some cargo and some damage to beaches and things like that, but the decision –

THE COURT: Well, I will read both of these and as you see, I will change my mind if you – if you show me I'm different; I meant, if I'm wrong, but –

MR. MOSELEY: The only – The only concerns I have that contractual issues with regards to third party

beneficiary of Clyde's warranty between themselves and River Don, (indiscernible) essential purpose in those contractual issues which it –

[p. 982] **THE COURT:** Well, see, even your (indiscernible) essential purpose, you're saying that mere – if it had been like in see the – well, I don't – well, it wasn't the Oxy producer –

MR. COUHIG: Oxy producer (indiscernible) bottom –

THE COURT: – it was one of the other –

MR. COUHIG: – of the ocean.

THE COURT: Went to the bottom of the ocean where the warranties do, but you're saying the – and as I understand it now, and I – You're saying the only failure of purpose of the warranty was the fact that they didn't do it cost free to you, and if they had done it and hadn't billed you for it, then –

MR. MOSELEY: They would've fulfilled their obligation.

THE COURT: – there wouldn't have been failure of purpose?

MR. MOSELEY: Right. They basically put themselves in a position of having to repair it free of charge, and then – and then they'd say that they're not to give us one without a purchase order and not going to do anything, and, you know, so what kind of – what kind of commercial relationship is that when you can't rely on your contract? That's – You're not getting the benefit of you – of your contract.

THE COURT: Well –

MR. MOSELEY: Your Honor, I'm just saying that those – those issues are obviously still reserved –

[p. 983] **THE COURT:** All right.

MR. MOSELEY: – because if any of those are approved, I would be entitled to those damages.

THE COURT: All right. Well, I will – I will read this over but I think this is probably going to be one point – see, because I had initially – even before I read in your deal where it said – after I read that East River case, I took that position and then I saw in one of your deals you said that the court's taking the position that that's splitting the baby, and that was precisely what I was doing; not that I was splitting the baby, I thought that was called for because if that East River – when they start talking about other property –

MR. MOSELEY: But, Your Honor, with regards to – in fairness to myself, with regards to that memorandum I – I wrote that was dealing with AmClyde. It was not until arguments in – in chambers which I came in, as you know, only halfway, and it took me a while to come up to speed. That dealt with River Don which is a separate issue altogether.

THE COURT: Well, I will read this, but –

MR. COUHIG: As I say, the issues are actually – you don't get across many still interesting issues in the law, and this, I think, is one.

THE COURT: Well, then, it's something that the Fifth Circuit needs to answer for the – for the benefit of –

is this same thing going to be involved in Judge Healey's (sp.ph.) case?

* * *

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* * *

[p. 2960] **THE COURT:** All right. Go on the record.

MR. MOSELEY: Your Honor, at this time, in order to clarify the situation with regards to P-4, McDermott Exhibit 4, since P-4, as it now exists as admitted evidence to the jury is summary of damages sent to the jury. We had offered supporting documents for those damages as a proffer, and we also had proffered our summaries of damage to the crane and supporting documents. Since P-4, as it exists now, is strictly summaries of the deck damage, we suggest to make the record clear that we enter as P-351 the summaries for the crane damage and the associated damage documents, and 352, as the documents in support of the deck damages, and proffer those to the Court separately from P-4 so there is no confusion. In addition to that, those same documents had been proffered by counsel for Clyde and River Don under their own numbers, and that those be referenced by reference incorporated in, and refer those Amclyde Exhibit numbers to the McDermott Exhibit numbers for purposes of proffer.

MR. O'BRIEN: Specifically, on behalf of Clyde, our Exhibits 556, 570, 579, and 596, 598 through 601, 608, 609,

611, 614, 615, 632, 633, and 646 are included in Mr. Moseley's Exhibits.

MR. MOSELEY: P-351 and P-352.

MR. O'BRIEN: And then we are withdrawing Exhibits 636 and 641, by mutual consent of the parties.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

McDERMOTT, INC., Plaintiff v. CLYDE IRON, ET AL., Defendants	§ § § § § § § §	C.A. H-88-2429 MEMORANDUM/ ORDER (Filed Jan. 17, 1991)

Defendants AmClyde and River Don Castings move the Court to assign a credit in the amount of One Million Dollars ($1,000,000.00) toward satisfying the Two Million, One Hundred Thousand Dollars ($2,100,000.00) damages awarded to plaintiff for which the two defendants were found to be seventy per cent (70%) responsible. Defendants assert that this apportionment must be made pursuant to *Hernandez v. M/V Rajaan*, 841 F.2d 582 (5th Cir. 1988) to prevent a double recovery by plaintiff for his damages.

The Court disagrees that *Hernandez* requires the grant of an automatic credit in all cases to non-settling defendants found liable for damages when a pre-trial settlement has been concluded between plaintiff and one or more settling defendants. The purpose of a *Hernandez* credit is to prevent a damage award in excess of a plaintiff's actual injuries suffered. The plaintiff in *Hernandez* received in the trial court a full award for his injuries from the sole defendant electing to proceed to trial. Indeed, plaintiff was even awarded excess damages and the appellate court ordered a remitter in the case. Hernandez received a full recovery for his damages from the

defendant tried and would have received a double recovery to the extent of his settlement with other defendants before trial.

Plaintiff here did not receive a full recovery for the total damages sustained by him in this case. Because *East River S. S. Corp. v. TransAmerica Delaval*, 476 U.S. 858 106 S.Ct. 2295 (1986), precluded any recovery by plaintiff under a products liability theory for damages to the Shearleg crane, a major portion of plaintiff's damages were taken from the jury 's consideration. Defendants are of the view that since plaintiff had no viable products liability claim under *East River* for loss of the Shearleg crane and no warranty or contractual claims against the settling defendants for that loss, the plaintiff has received by the jury award the full recovery to which he is entitled for his damages.

Defendants further object to the apportionment of the settlement between damages to the Shearleg crane and to the snapper deck. Again, the Court disagrees. The fact that plaintiff may have no legal claim enforceable in court against a defendant for whatever reason does not negate the fact that plaintiff here did, in fact, suffer substantial damages in excess of that recovered by the jury verdict and the settlement. Plaintiff has not, in this Court's opinion, made a double recovery which must be corrected by a *Hernandez* credit to the non-settling defendants. To hold as the defendants request would result in the settling defendants, who were at the most thirty per cent (30%) responsible for the accident (no separate contributory negligence, if any, finding was made as to McDermott), paying One Million Dollars ($1,000,000.00) while the defendants who insisted on a trial and were

found to be seventy per cent (70%) liable would pay Four Hundred and Seventy Thousand Dollars ($470,000.00) between them. That is unjust and clearly is not required by *Hernandez*. It is therefore,

ORDERED that defendants' motion for a *Hernandez* credit is DENIED.

The Clerk shall enter this Order and provide a copy to all parties.

DONE at Houston, Texas, on this the 4th day of January, 1991.

/s/ George A. Kelt, Jr.
GEORGE A. KELT, JR.
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

McDERMOTT, INC., Plaintiff	§	C.A. H-88-2429
	§	JUDGMENT
v.	§	(Filed Jan. 17, 1991)
CLYDE IRON, ET AL., Defendants	§	

This matter came on for trial on the merits before the Court and the Jury, Honorable George A. Kelt, Jr., United States Magistrate Judge, presiding; and plaintiff, having compromised its claims against defendants, British Ropes, Ltd., International Southwest Sling, Inc., and Hendrik Veder, b.v., prior to trial for a total amount of One Million Dollars ($1,000,000.00); and the issues having been tried as to the remaining defendants, AmClyde , a Unit of AMCA International Corporation, and River Don Castings, Ltd.; and the jury having rendered its verdict on December 7, 1990, in favor of plaintiff and against defendants, for a total amount of Two Million, One Hundred Thousand Dollars ($2,100,00.00) with no pre-judgment interest, and thirty per cent (30%) fault allocated to plaintiff, McDermott, Inc., thirty-two per cent (32%) fault allocated to AmClyde, a Unit of AMCA International Corporation, and thirty-eight per cent (38%) fault allocated to River Don Castings, Ltd.; accordingly the Court enters its Judgment as follows:

It is hereby ORDERED that the jury verdict awarding total damages in the amount of Two Million, One Hundred Thousand Dollars ($2,100,00.00) with no pre-judgment interest, be reduced by thirty per cent (30%), reflecting that percentage of fault allocated to plaintiff, McDermott, Inc., for a total damages award of One Million, Four Hundred Seventy Thousand Dollars ($1,470,000.00). It is further

ORDERED that there be final judgment herein, pursuant to Rule 54 of the Federal Rules of Civil Procedure, in favor of plaintiff, McDermott, Inc., and against AmClyde, a Unit of AMCA International corporation, severally, for a total amount of Six Hundred Seventy-Two Thousand Dollars ($672,000.00). It is further

ORDERED that there be final judgment herein, pursuant to Rule 54 of the Federal Rules of Civil Procedure, in favor of plaintiff, McDermott, Inc., and against defendant, River Don Castings, Ltd., severally, for a total amount of Seven Hundred Ninety-Eight Thousand Dollars ($798,000.00). It is further

ORDERED that AmClyde, a Unit of AMCA International Corporation, take nothing under its Cross-Claim against McDermott, Inc., for the costs of replacing the hook used on the five thousand ton Shearleg crane. It is further

ORDERED that costs of these proceedings be allowed plaintiff as prevailing party pursuant to Rule 54 of the Federal Rules of Civil Procedure. Plaintiff will submit its taxable costs within twenty (20) days of the receipt of this order.

The Clerk shall enter this Order and provide a copy to all parties.

DONE at Houston, Texas, on this the 15th day of January, 1991.

/s/ George A. Kelt, Jr.
GEORGE A. KELT, JR.
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

McDERMOTT, INC., Plaintiff	§	C.A. H-88-2429
v.	§	FINAL JUDGMENT
CLYDE IRON, ET AL., Defendants	§	(Filed Feb. 5, 1991)

Judgment is entered against defendant Clyde Iron and River Don Castings in accordance with the Judgment signed on January 15, 1991. This cause is DISMISSED with prejudice as to Bridon Ropes, Ltd. (previously known as British Ropes, Ltd.), International Southwest Slings, Inc., and Hendrik Veder, B.V. only.

This is a FINAL JUDGMENT.

The Clerk shall enter this Order and provide a copy to all parties.

DONE at Houston, Texas, on this the 31st day of January, 1991.

/s/ George A. Kelt, Jr.
GEORGE A. KELT, JR.
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

McDERMOTT, INC.,	§	C.A. H-88-2429
Plaintiff	§	SUPERSEDING
	§	FINAL
v.	§	JUDGMENT
CLYDE IRON, ET AL.,	§	(Filed
Defendants	§	Mar. 14, 1991)

All motions seeking relief under Rules 50 and 59 of the Federal Rules of Civil Procedure are denied. It is hereby

ORDERED that a Final Judgment is entered in this case.

This is a superseding Final Judgment.

The Clerk shall enter this Order and provide a copy to all parties.

DONE at Houston, Texas, on this the 14th day of March, 1991.

/s/ George A. Kelt, Jr.
GEORGE A. KELT, JR.
United States Magistrate
Judge

RECEIPT, RELEASE AND SETTLEMENT AGREEMENT

WHEREAS, on or about 10 October 1986, at or in the vicinity of East Breaks Block 165, Gulf of Mexico, an accident occurred involving the 5000 Short Ton Shearleg Crane, its Main Hook, the SNAPPER/SOHIO deck section, and various cable laid slings used in the lift rigging, all of which was owned and/or operated by McDermott, Inc. resulting in physical damage to said property.

WHEREAS, McDermott, Inc. has made demand upon and filed suit against, inter alia, Bridon Ropes, Ltd. (previously known as "British Ropes, Ltd.), International Southwest Slings, Inc., and Hendrik Veder B.V. (all of said parties defendant being referred to, hereinafter, in globo, as "Sling Defendants") seeking recovery of $7,200,000.00 in damages plus interest, cost and fees wherein McDermott, Inc. alleges it has suffered as a result of the aforementioned accident, liability for which is in no way admitted or accepted by Sling Defendants; and

WHEREAS McDermott, Inc., Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's Risk) and Underwriters Subscribing to Policy No. MCD-1986-1-A (Contractor's Equipment) and the Sling Defendants now wish to settle, adjust, and compromise their differences on the basis hereinafter set forth reserving unto McDermott, Inc., Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's Risk) and Underwriters Subscribing to Policy No. MCD-1986-1-A (Contractor's Equipment) all rights against any and all parties other than the Sling Defendants specifically named herein and subscribing hereto.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS:

That for and in consideration of the full sum of ONE MILLION U.S.D. cash in hand paid by, for the account of, or on behalf of the Sling Defendants, it being agreed that of said sum, Bridon Ropes, Ltd. and those at interest therewith shall be responsible only for payment of U.S.D. 500,000, that International Southwest Slings, Inc. and those at interest therewith shall be responsible only for payment of U.S.D. 200,000, that Hendrik Veder, B.V. and those at interest therewith shall be responsible only for payment of U.S.D. 300,000, and it being further agreed that of that full sum U.S.D. 500,000 is allocated to McDermott, Inc. and Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's Risk) for damages associated with the SNAPPER/SOHIO deck section and U.S.D. 500,000 is allocated to McDermott, Inc. and Underwriters Subscribing to Policy No. MCD-1986-1-A (Contractor's Equipment) for damages associated with the Shearleg Crane, the receipt and sufficiency of which is hereby acknowledged and due acquittance and discharge therefore granted, McDermott, Inc., Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's Risk) and Underwriters Subscribing to Policy No. MCD-1986-1-A (Contractor's Equipment) do hereby release, remise, and forever discharge the Sling Defendants only, their agents, servants, employees, underwriters, officers, managers, directors, stockholders, subsidiary and affiliated corporations, successors, assigns, owners, charterers, operators, attorneys and insurance carriers of and from any and all rights, claims, liens, remedies, demands or causes of

action of whatever nature, for all damages, whether statutory, in contract or in tort, including but not limited to the physical damage to McDermott, Inc.'s property as set out above and any equipment, appurtenance, cargo, thing or person thereon, loss of use, production and/or profit, interest and any other related consequential and miscellaneous expenses which it has suffered, either directly or indirectly resulting from the accident of 10 October 1986 in which the Main Hook of the Shearleg Crane and a cable laid sling assembly failed, damaging the SNAPPER/SOHIO deck section and the Shearleg Crane, described above, whether under any contract or policy of insurance, whether at law, in equity, or in admiralty, or whether the same be now known or later discovered.

This sum and the terms set out hereinabove are also accepted in full settlement, satisfaction, discharge, and compromise of any and all claims against the Sling Defendants only made by or on behalf of McDermott, Inc. in that complaint filed in the United States District Court for the Southern District of Texas, Houston Division, entitled "McDermott, Inc. versus Clyde Iron, River Don Castings Limited, British Ropes Limited and International Southwest Sling Incorporated", bearing number H-88-2429, which complaint shall be dismissed with prejudice as of compromise, as to the above named Sling Defendants only and reserving to Plaintiff all rights and actions against any and all other parties, each party to this settlement to bear his or its own costs as a further term of this agreement.

McDermott, Inc., Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's risk) and Underwriters and Subscribing to Policy No. MCD-1986-1-A (Contractor's

Equipment) hereby warrant that McDermott, Inc. is the sole owner and/or operator of the above described property and is the party entitled to assert any claim for damages to said property, including but not limited to any consequential damages, interest, fees or expenses out of the aforementioned accident. In further consideration of said payment, McDermott, Inc., Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's Risk) Underwriters Subscribing to Policy No. MCD-1986-1-A (Contractor's Equipment) do hereby agree to indemnify, hold harmless, and defend all and singular, all of the parties and vessels released, from and against all claims, liens, demands or causes of action which hereafter may be asserted by any person, firm or corporation for the damage to the property aforementioned, including but not limited to any claims, demands or causes of action for contribution (whether in tort, in admiralty or statutory) arising from the damage to the property aforementioned including any claims, liens, or causes of action arising from the negligence, in whole or in part, if any, of the parties and vessels released herein, arising out of or resulting from the accident of 10 October 1986 described with particularity hereinabove.

For and in consideration of their respective contributions to and acceptance of this settlement, its terms, and conditions, McDermott, Inc., Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's Risk) and Underwriters Subscribing to Policy No. MCD-1986-1-A (Contractor's Equipment) and the Sling Defendants only do hereby release, remise, and forever discharge each other, as well as their respective agents, servants, employees, underwriters, stockholders, managing agents, officers,

directors, subsidiary and affiliated companies,successors, assigns, owners, charterers, and operators from any and all claims, rights, liens, or causes of action which they have or may hereafter have, including but not limited to any and all claims for contribution or indemnity, legal or conventional, express or implied, civil or maritime, including any claim they might have against each other for attorneys' fees and expenses incurred on or before the date this receipt, release, and settlement agreement is signed, in connection with or as a result of the above described, particular accident of 10 October 1986 and resulting damages, whether the same be now known or hereafter discovered; except to the extent any term, condition, or provision of the preceding paragraph, then the term, condition or provision of the preceding paragraph shall control.

It is expressly understood and agreed by all parties to this receipt and release that the payment aforementioned is made purely by way of compromise and settlement and is in no way to be construed as an admission of liability on the part of any party hereto. It is further understood and agreed that this settlement, compromise, receipt and release applies only to the parties named herein and subscribing hereto and that McDermott, Inc. and/or Underwriters Subscribing to Policy No. MCD-1985-21 (Builder's Risk) and Underwriters Subscribing to Policy No. MCD-1986-1-A (Contractor's Equipment) reserve and retain all rights and actions against any and all other persons or parties.

IN EXECUTION AND WITNESS WHEREOF, we have hereunto set our hands, in original, this 11 day of January, 1991.

/s/ David J. Plavnicky
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Lea, Plavnicky & Moseley
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Attorneys for Hendrik
Veder, B.V.

ITEM NO. 25 SOHIO DECK CLAIM / REVISED - EX 11

	A	B	C	D	E	F	G	H	I	J	K	L
1		LABOR/BURD	CONT. LABOR	EQUIPMENT	OPERATING	G & A	INTEREST	MATERIAL	TOTALS	CLAIM INCOME	PROFIT	% PROFIT
2												
3												
4	MARINE DIVISION											
5	I-7018	27,380.70	0.00	231,383.06	38,580.64	36,310.94	34,440.00	1,346,062.09	1,714,157.43	2,082,223.13	368,065.70	17.68%
6												
7												
8												
9												
10	FABRICATOR DIV.											
11	13878	178,512.39	15,884.30	0.00	161,349.21	56,375.19	17,495.87	241,400.24	671,017.20	1,054,759.95	383,742.75	36.38%
12												
13												
14												
15	HUDSON ENG.											
16	18011	11,202.00	0.00	5,982.00	6,241.00	10,920.00	2,496.00	6,880.00	63,721.00	108,690.00	44,969.00	41.37%
17												
18												
19												
20	TOTALS:	237,095.09	15,884.30	237,365.06	206,170.85	103,606.13	54,431.87	1,594,342.33	2,448,895.63	3,245,673.08	796,777.45	24.55%
21												
22												
23	FINANCIAL											
24												
25												
26												
27												
28												
29	NOTE: CLAIM INCOME AS SHOWN DOES NOT REPRESENT MCDERMOTT'S FINANCIAL STATEMENTS ($2,674,752.67) , BUT RATHER THE AMOUNT RECOGNIZED PLUS											
30	ADDITIONAL INCOME WE ARE DUE FOR THIS CLAIM AS INDICATED ON SHEDULE OF CHARGES.											

RELIEF

ITEM NO. 24 SHEAR LEG CRANE / REVISED EX 10

	A	B	C	D	E	F	G	H	I	J	K	L
1	DESCRIPTION	LABOR/BURD	CONT. LABOR	EQUIPMENT	OPERATING	G &A	INTEREST	MATERIAL	TOTAL COST	CLAIM INCOME	PROFIT	% PROFIT
2												
3	MARINE DIVISION											
4	I-7019	511,860.39	0.00	55,032.04	127,997.98	117,845.01	0.00	1,275,754.65	2,088,490.07	2,831,439.02	742,948.95	26.24%
5												
6	FABRICATOR DIV.											
7	13879	85,279.33	200.00	1,670.40	70,948.05	24,788.78	7,693.02	59,069.12	249,648.70	725,525.50	475,876.80	65.59%
8												
9	SERVICES DIV.											
10	88325	0.00	0.00	0.00	0.00	0.00	0.00	18,654.98	18,654.98	16,958.76	(1,696.22)	-10.00%
11												
12	MCDERMOTT E & M											
13	95969	53,346.94	0.00	0.00	19,811.47	6,924.27	0.00	30,377.80	110,460.48	110,460.48	0.00	0.00%
14												
15	MCD INT. NORTH SEA	0.00	0.00	0.00	0.00	0.00	0.00	22,143.45	22,143.45	11,480.91	(10,662.54)	-92.87%
16												
17	B & W	4,459.90	0.00	0.00	9,365.80	0.00	0.00	2,518.10	16,343.80	16,343.80	0.00	0.00%
18												
19	HARVEY SUPPLY	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	440.38	440.38	100.00%
20												
21	MCD DUBAI	0.00	0.00	0.00	0.00	0.00	0.00	55,795.00	55,795.00	56,901.00	1,106.00	1.94%
22												
23	MAIN OFFICE	0.00	0.00	0.00	0.00	0.00	0.00	770.88	770.88	770.88	0.00	0.00%
24												
25												
26	TOTALS:	654,946.56	200.00	56,702.44	228,123.30	149,558.06	7,693.02	1,465,083.98	2,562,307.36	3,770,320.73	1,208,013.37	32.04%
27												
28												
29	NOTE: CLAIM INCOME AS SHOWN DOES NOT REPRESENT MCDERMOTT'S FINANCIAL STATEMENTS ($2,736,422.85), BUT RATHER THE AMOUNT RECOGNIZED PLUS											
30	ADDITIONAL INCOME WE ARE DUE FOR THE CLAIM AS INDICATED ON SCHEDULE OF CHARGES.											

No. 92-1479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MCDERMOTT, INC.,

Petitioner,

VS.

AMCLYDE, A Division of AMCA International, Inc. and River Don Castings, Ltd.

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

---

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the petitioner has stated any special or important reason for this Court to exercise its judicial discretion given the specific facts of the underlying case and the present uncontroverted state of the law on those issues relevant to this matter.

LIST OF PARTIES

Parties to the proceedings below were the petitioner McDermott, Inc., the respondents AmClyde, a division of AMCA International, Inc. (formerly "Clyde Iron"), River Don Castings, Ltd., and defendants British Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V.

RULE 29.1 LIST

The parent corporation of AmClyde, a division of AMCA International, Inc. (formerly "Clyde Iron"), is United Dominion Industries.

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1479

MCDERMOTT, INC.,

Petitioner.

vs.

AMCLYDE, A Division of AMCA International, Inc. and River Don Castings, Ltd.,

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

---

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents adopt the statement of the case submitted by the Petitioner with two exceptions:

(a) McDermott did not object to nor seek reconsideration of the proclusion of a contract claim against River Don.

(b) McDermott's statement that "the Fifth Circuit also refused to notice a box full of proffered evidence

of McDermott's Shearleg Crane damages, and denied McDermott its right to present this evidence to a jury." The Fifth Circuit for those reasons stated, infra, acted appropriately.

STATEMENT OF FACTS

Respondents adopt the petitioner's statement of facts with two additions:

(a) Respondents do not believe the evidence established a defect but admit that the jury found that the hook was defective.

(b) Respondents supplied a replacement hook and were never paid for that replacement.

REASONS TO DENY THE WRIT

I. THERE IS NO MATERIAL CONFLICT IN THE CIRCUIT COURTS ON THE EFFECT IN MARITIME LAW OF A PLAINTIFF'S SETTLEMENT WITH LESS THAN ALL DEFENDANTS UPON THE LIABILITY OF NON-SETTLING DEFENDANTS RELEVANT TO THIS MATTER

McDermott's argument that this case is the proper vehicle to resolve its perception that the Circuit Courts are in conflict on the effect in maritime law of a plaintiff's settlement with less than all defendants upon the liability of a non-settling defendant is flawed. The decision of the Fifth Circuit correctly followed the law of the circuit and no case in any other circuit cited by the plaintiff is, in any way, in conflict with it.

In its initial argument, McDermott suggests that the Fifth Circuit applied new law to a settlement and a judgment that had been rendered under some other standard. This is incorrect. The record reflects the

following: *Hernandez v. M/V RAJAAN*, 841 F.2d 582, 591 (5th Cir. 1988) was the law of the Fifth Circuit at the time of settlement and trial; counsel for the non-settling defendants, upon being notified of the settlement, in which his clients did not participate, immediately notified opposing counsel and the Court of his intention to take a *Hernandez* credit; both the Court and plaintiff's counsel recognized *Hernandez* before the trial began (A-4); plaintiff's counsel asked that the issue of settling defendants fault *not* be put to the jury and that certain elements of fault on the part of the settling defendants not be presented to the jury (e.g., failure to warn) (A-2); the trial court recognized *Hernandez* to be the law but refused to give the credit for a reason that was irrelevant according to the Fifth Circuit (Petitioner's A-27); the Fifth Circuit's decision was consistent with its decisions since *Hernandez* in applying the credit (Petitioner's A-27); and McDermott, in its various briefs and arguments for rehearing, never suggested that there was a conflict in the circuits on the issue.

McDermott has stated that the approach taken by the Eleventh and Fifth Circuits is a rejection of *U.S. v. Reliable Transfer Co.*, 421 U.S. 397, 955 S.Ct. 1708, 44 L.Ed.2d 251 (1975) and *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753 61 L.Ed.2d 521 (1979), and suggests that the Fifth Circuit has simply refused to follow this Court's statement of the law. This is obviously not the case.

The "disharmony" in the circuits argued by plaintiffs has nothing to do with this case. The cases cited by plaintiffs do *not* stand for the proposition that a dollar for dollar credit is an inappropriate ap-

proach. Indeed, not one case cited by plaintiffs reject the dollar for dollar credit.[1] Rather, the articles and cases cited are in response to those cases in which a non-settling defendant sought contribution from a settled defendant. There appeared to be some confusion on the surface as to whether an action for contribution would be allowed or whether it would be barred by a good faith settlement or whether the court would simply reduce the amount of the claim by the settling defendant's fault. The circuit courts have held that the latter approach is appropriate.

The holding of the Eleventh and Fifth Circuit is consistent with the Eighth Circuit. The only difference between the Eighth Circuit and the Eleventh and Fifth Circuits is the methodology of reduction. In *Associated Electric Corp. v. Mid American Transportation Co.*, 931 F.2d 1266 8th Cir. 1991, the Eighth Circuit allowed a pro rata reduction for fault determined at trial for a settled defendant. There was no suggestion in that case that the question of a reduction based on the amount of payment was ever at issue.[2] The Fifth and Eleventh Circuits recognized that the risk of a settlement should be placed on the parties entering into the settlement. As a result, they have simply reduced the claim by the amount of the settlement.

Finally, what the Eleventh Circuit did in *Self v. Great Lakes Dredge & Dry Lock Co.*, 832 F.2d 1540 (11th Cir. 1987) and the Fifth Circuit did in *Hernandez* is in line with the philosophy of this Court as espoused in *Reliable Transfer* and *Edmonds*. What is important at the trial between the plaintiff and any remaining defendant is the resolution of each's responsibility for that part of the claim for which plaintiff has not been compensated. Thus, as in this instance, where a plaintiff has sustained $2,400,000 in damages and has already received a $1,000,000 settlement, his remaining damages cannot exceed $1,400,000. The jury must then determine how much of the damages were caused by the defendant in court. This is what was done in this case and the Fifth Circuit's application of *Hernandez* was consistent with the holdings in *Reliable Transfer* and *Edmonds*.

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[1] In Footnote 8, McDermott attempts to cite cases for the proposition that the circuits are in conflict regarding the issue, however, the cases cited do nothing to establish the conflict. In *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987), the court considered a limit of liability action under 46 U.S.C. § 1983. In *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218 (S.D.N.Y. 1991), the issue was whether contribution would be allowed between the settling and non-settling tort feasors. In *Dobbins v. Crain Bros. Inc.*, 567 F.2d 559 (3rd Cir. 1977), the court only considered whether there was no right of contribution between a dock owner and a barge owner in Jones Act claim. In *Burden v. U.S.*, 1993 AMC 40 (S.D.W.Va. 1992), the court never considered the determination of apportionment of damages. Likewise, in *Doyle v. U.S.*, 441 F. Supp. 701, (D.S.C. 1977) the court did not consider the pro tanto approach and merely applied a pro rata approach.

[2] Nor was there a "searching consideration to the disarrayed state of the law on this issue, the recommendations of scholarly commentators, and the pragmatic observations of trial court decisions" in determining whether a proportional versus dollar-for-dollar reduction would take place as plaintiff's Petition implies at page 14. The issue was *never* mentioned.

II. THE FIFTH CIRCUIT PROPERLY APPLIED NEW YORK CONTRACT LAW WITH RESPECT TO PETITIONER'S CLAIM AGAINST AMCLYDE AND EAST RIVER WITH RESPECT TO PETITIONER'S CLAIM AGAINST RIVER DON.

McDermott's suggestion that the Fifth Circuit failed to follow this Court's ruling in *East River SS. Corp. v. Transparence Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 2d 865 (1986) is both factually and legally wrong.

McDermott attacks the ruling of the Fifth Circuit in which McDermott's claim against AmClyde was limited to the remedy afforded under the contract. A casual reading of its writ application would lead the reader to believe that the Fifth Circuit's ruling limiting the recovery was in some way related to an *East River* argument. This is not the case. The Fifth Circuit properly analyzed the contract (III and IV of its Opinion) (Petitioner's A-7 - A-18) and found that as a matter of New York law (the law both parties agreed controlled the contract between the parties), McDermott's recovery was limited. After the Court carefully reviewed the contract, New York law, the pleadings, and testimony, it determined as a matter of law that McDermott's recovery was limited to that for which it bargained—a limited repair warranty.

With respect to the tort claim, it was not necessary for the Court to analyze *East River* because, as the Court pointed out, Article XV of the McDermott-AmClyde Contract provided that "correction of a nonconformance in the manner provided above, shall constitute fulfillment of all liabilities of the seller to the buyer or any other person *whether based upon Contract, tort, strict liability or otherwise*" (emphasis added by the United States Court of Appeals for the

Fifth Circuit). The Court held that this language protected AmClyde from any liability in tort. (Petitioner's A-18).

McDermott's challenge to the Fifth Circuit's ruling with respect to *East River* is thus limited to the claim against River Don. This challenge again is both factually and legally flawed.

McDermott has never asserted that the crane was other property and is thus subject to any exclusion to the *East River* doctrine. Rather, its position is that if there is damage to any other property, this eviscerates the holding in *East River*. This is without merit.

It is important to put this matter in the same perspective as that which both the trial court and the Court of Appeals enjoyed. River Don had previously argued that the damage to the deck for which the Fifth Circuit allowed recovery was not other property as contemplated by this Court in *East River*. It was owned by the same entity and the shear leg crane was specifically designed to be used in the picking up the deck. The Fifth Circuit rejected that argument and held that it did constitute other property.[3] Thus, McDermott was allowed to proceed in its claim for damages to the deck.

The proposition put forth by McDermott that damage to other property opens the defendant to responsibility for the entire loss was specifically rejected by the Fifth Circuit. Importantly, McDermott has not

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[3] While respondents believe that the deck did not constitute other property as suggested by this Court in *East River*, Respondents have not sought review of the Appellate Court's decision.

been able to cite to this Honorable Court one case in either a state or federal court to support its thesis. Rather, it attempts to take the fact that *East River* acknowledged the availability of a product liability claim for other property and personal injury and boot strap it into a claim on the property itself. The reason no such case exists is because McDermott has failed to understand the basis philosophy of *East River*. Risk is a function of commerce. Society allocates risk in allowing claims under tort where the parties would not otherwise be in a position to do so. Thus, there can be a claim for personal injury or damage to other property. However, where entities of relatively equal bargaining power are engaged in commerce, these entities uniquely have the ability to allocate the risk between them. Where no specific arrangement is made, then each party bears its own risk. It is not the place of the court to allocate risk in a commercial maritime setting.

III. THE FIFTH CIRCUIT PROPERLY HELD THAT MCDERMOTT DID NOT PRESERVE A WARRANTY CLAIM AGAINST RIVER DON.

McDermott did not preserve its claim to a warranty recovery from River Don for damage to the crane. In an effort to establish that it did so, McDermott points to instances where the alleged amount of damage to the crane was preserved. The issue of the damage to the crane would have been necessary only if there had been a decision that the *East River* decision of the trial court (subsequently upheld by the Fifth Circuit) was erroneous and the plaintiff has been allowed to proceed for damages *under tort law* for damages to the crane.

The Court of Appeals recognized Petitioner's flawed argument in its opinion in quoting McDermott that "it was not allowed to proceed in contract" but McDermott further stated that "the evidence addressed at trial demonstrated that River Don made express and implied warranties." (Petitioner's A 18-19) McDermott *never* preserved a contractual claim against River Don. It neither sought nor objected to the failure to include a jury interrogatory on the issue of any perceived contractual responsibility on the part of River Don. No aspect of the record cited to this Court or in the underlying record reflects such a claim. To the contrary, McDermott's position at trial was that *no* contractual claim existed:

[P. 59] Mr. Lea [McDermott's counsel]: We maintain that River Don does not get benefit of *East River* because we don't have any contractual relationship with them. That's different now than Clyde. "(Petitioner's A-40).

McDermott determined it had no contractual claim. Because it knew there was no right, it took no step to preserve one.

CONCLUSION

This Honorable Court should deny the Application for Writ of Certiorari. Petitioner has not submitted any issue that meets the criteria of special and important reasons for the granting of the writ as described in Rule 10 of this Honorable Court's Rules. Petitioner has, however, attempted to create arguments that would suggest a conflict in the circuit courts and has suggested that the United States Court of Appeal for the Fifth Circuit has so far departed from the accepted and usual course of judicial pro-

ceeding so as to require this Court to utilize its decretion to cure these problems. The current state of the law and the underlying record reflects that petitioner's arguments are completely without merit.

Respectfully submitted,

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Counsel of Record

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Counsel for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. CA-H-88-2429

McDERMOTT, INC.

VERSUS

CLYDE IRON, RIVER DON CASTINGS LIMITED, BRITISH ROPES LIMITED, INTERNATIONAL SOUTHWEST SLINGS INCORPORATED, HENDRIX VEDER, B.V., McDERMOTT MARINE CONTRACTORS INCORPORATED, HUDSON ENGINEERING, INC.

HOUSTON, TEXAS

NOVEMBER 29, 1990

9:04 A.M. TO 12:30 P.M.

VOLUME 19 OF 28
PAGES 2061-2180

FILED

APR 19 1991

Jesse E. Clark, Clerk

TRIAL

BEFORE THE HON. GEORGE KELT, UNITED STATES MAGISTRATE

* * * *

of fault, then we should have the right to prove that—his percentage of fault. Go ahead, Mr. Lea.

MR. LEA: I think he's intermixing apples and oranges here. Judge—

THE COURT: Splice and things.

MR. LEA: Yes, splicing them together and not unravelling them. But what the—Your Honor, the real question is: you can be negligent all day, but you're only responsible for the damage your negligence cause absent an allegation of punitive damage which nobody's made here. You're negligent. You're negligent. You're responsible for the result of your action. He's trying to go back and prove something he doesn't have to prove; that is, we had knowledge of something and to the extent the slings caused the accident, to that extent, we're responsible. We're acknowledging, and you charge is sling. You're only responsible for the damage you do, and to the extent the slings caused damage, to that extent because of McDermott and the sling manufacturer's settlement, we bear the responsibility. You don't have to go prove something because what they prove can only lead to a finding of responsibility, and you're only responsible for the direct consequences of your own act, and we've already said, we're responsible for the slings, any part they played in it. Thank you.

MR. COUHIG: Your Honor—

MR. O'BRIEN: We don't want to beat a dead horse, Your

* * * *

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

CASE NO. CA-H-88-2429

McDERMOTT, INC.

VERSUS

CLYDE IRON, RIVER DON CASTINGS LIMITED, BRITISH ROPES LIMITED, INTERNATIONAL SOUTHWEST SLINGS INCORPORATED, HENDRIX VEDER, B.V., McDERMOTT MARINE CONTRACTORS INCORPORATED, HUDSON ENGINEERING, INC.

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• • • •

MR. MOSELEY: We stipulated, he doesn't.

MR. COUHIG: I don't think as a cor—as a—I am very concerned and I don't want to get into the big brouhaha again as to how this effects, for example, I'm entitled to my *Hernandez* I believe credit for the fault of—or for the settlement.

THE COURT: Well—

MR. LEA: That doesn't effect it.

THE COURT: That doesn't effect this and that's going to be somewhere down the line. You're going to have a tough time with that since they have—that *Hernandez*, as I read it and perhaps I'm wrong, as I understand that of course is to prevent double recovery for anything.

MR. COUHIG: That's correct.

THE COURT: In other words, you can't get—

MR. COUHIG: He can't get 3.5 million dollars. He could get 2.5 million dollars.

THE COURT: No. That's not what—if—well, all right, you may be right if that's all he was suing for. Say he sued for 2.5 million dollars and he recovered 2.5 million dollars and they had this other million dollars, you're entitled to credit. No question about it under *Hernandez*. But the problem, as I see it from your situation, and I may be wrong, but the problem as I see it from your situation, he's got two million dollars damage to the rig that he ain't going to be able

• • • •

No. 92-1479

In The

Supreme Court of the United States

October Term, 1992

McDERMOTT, INC.,

Petitioner,

vs.

AmCLYDE, A DIVISION OF AMCA INTERNATIONAL, INC. and RIVER DON CASTINGS, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES AND RULE 29.1 LIST

The List of Parties and Rule 29.1 List published at pages ii-iv of the Petition for Writ of Certiorari, are reiterated herein as if copied *in extenso.*

The "Rule 29.1 List" appearing at page iii of Respondents' Opposition is, on information and belief, deficient by its failure to list River Don Castings, Ltd., its parent and sister companies, if any, and by its failure to list the subsidiaries, affiliates, and partnerships of United Dominion Industries.

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PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

Petitioner, McDermott Incorporated (hereinafter "McDermott") respectfully submits this, its Reply Brief, and prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on 11 December 1992.

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents admit in their "Statement of the Case" that: a) the trial court precluded McDermott's assertion of contract law claims against River Don;[1] and b) that "the Fifth Circuit also refused to notice a box full of proffered evidence of McDermott's Shearleg Crane damages, and denied McDermott its right to present this evidence to a jury." Thus, Respondents do not dispute the facts of these errors below.

REPLY TO RESPONDENTS' ARGUMENT

Respondents do not address Petitioner's argument and law; rather, they merely repeat some of Petitioner's arguments in the negative, and self-servingly assert that the rulings below were correct.

I. THE *SELF/LEGER* "CREDIT FOR SETTLEMENT" CONFLICT

Respondents claim there is no conflict. The Chairperson of the Maritime Law Association Committee on Uniformity disagrees. L. Burrell, "Uniformity in Maritime Law," 5 U.S.F.Mar.L.J. 67 (Fall 1992). See also E. Johnson,

[1] Respondents' statement that, "McDermott did not object to nor seek reconsideration of the proclusion [sic] of a contract claim against River Don." is simply false. Please see Plaintiff's "Memorandum in Support of Motion to Reconsider Claims Denied Pursuant to East River," filed during trial of this matter, reproduced in the Supplemental Appendix hereto.

"The Conflicting Doctrines of *Self* and *Leger*: The Unsettling Uncertainty of Settlement in Admiralty," 41 Ala.L.Rev. 471 (Winter 1990).

The Eighth Circuit, in *Associated Electric Corp. v. Mid-American Transportation Corp.*, 931 F.2d 1266 (8th Cir. 1991) is in direct conflict with the Fifth and Eleventh Circuits on the "credit for settlement" issue and the scope of *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed. 2d 521 (1979). Respondents attempt to deny this conflict by an *argumentum ad hominem* denigration of the Eighth Circuit's scholarship in *Associated Electric*'s express rejection of *Self v. Great Lakes Dredge & Dry Dock Co.*, 832 F.2d 1540 (11th Cir. 1987) and adoption of the "pro rata" approach of *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979).

Bald denial of this obvious, well documented and much litigated problem cannot obscure the fact that the Circuits are in conflict. Trial courts, litigants and legal scholars find maritime law in disarray and urgently in need of the unifying consideration of this Honorable Court's review on the issues raised by non-settling tort-feasors' attempts to obtain credit for settling tort-feasors' private, independent resolution of their own liabilities with plaintiffs.[2]

[2] Since filing of the Petition herein, the Alabama Supreme Court, in *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp., et al.*, slip opinion, 1993 WL 154448 (Ala. May 14, 1993), noted the Eleventh Circuit's "wrong turn" in the *Self* line of cases and held that *Leger* represented the correct rule of federal maritime law.

The Seventh Circuit has also entered the fray with *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992), disagreeing with *Leger* and *Associated Electric*, but deferring its choice

The late Judge Brown and Judges Barksdale and Johnson of the Fifth Circuit acknowledged the conflict in *Hardy v. Gulf Oil Corp.*, 949 F.2d 826 (5th Cir. 1992). In *Williams v. Fab-Con, Inc.*, 990 F.2d 228, 233 (5th Cir. 1993), the Court acknowledged,

> " . . . that *Hernandez* and *Leger* are at odds, but our recent opinion in *McDermott, Inc. v. Clyde Iron, et al.*, 979 F.2d 1068 (5th Cir. 1992); clearly holds that the rationale expressed in *Hernandez* is the law of this Circuit. Because the district court did not have the benefit of our decision in *McDermott*, we vacate the damage award to Fab-Con and remand for reconsideration by the district court."

Of course, the *McDermott* district court was also denied the dubious benefit of the Fifth Circuit's adulterous embrace of *Self*, despite *Leger. Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir.), cert. denied, 488 U.S. 981 (1988) was then but an aberation in settled Fifth Circuit jurisprudence. Yet the Court of Appeals, even with evidence of "Shearleg Crane damages" to which McDermott's settlement with the "sling defendants" was at least partially attributable, unjustly reversed and declined to remand in identical legal circumstances to *Williams*. *Williams* shows that even if *Hernandez* is now the law of the Fifth Circuit, equal protection and due process of law require the Fifth Circuit to remand this case to the trial court to resolve the "credit for settlement" issues.

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between settlement bar and unbridled contribution approaches. The Court expressly declined to consider the effect of strict liability on this question.

Certiorari should be granted, if for no other reason, to order such remand.

II. REPLY TO RESPONDENTS' ATTEMPTS TO EVISCERATE MARITIME PRODUCTS LIABILITY

After seven years at sea, powered only by underperforming turbines, and after innumerable collisions with catastrophic losses and commercial realities, *East River*[3] is in serious need of a dry docking. The present case reveals breaches in *East River's* hull that cannot be "patched over" with warranty paper. If she is left to ground where Respondents and the Fifth Circuit have navigated her, she will be an obstruction to just navigation in maritime law – a "hard case" that made "bad law."

A. RESPONDENTS CANNOT DROWN MARITIME TORT LAW IN A CONTRACTUAL PUDDLE

AmClyde's "Contract for Supply of 5000 Short Ton Shearleg Derrick" had nothing to do with the Snapper Deck, damaged due to the Shearleg Crane's catastrophic failure. The Shearleg Crane was not " . . . specifically designed to be used in the picking up [sic] the deck . . . ,"[4] like a $7.5 million, "one-shot" disposable piece of equipment.

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[3] *East River S.S. Corp v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 2d 865 (1986).

[4] Opposition brief at page 7. The trial record shows that the Shearleg Crane was being purchased to perform certain types of marine heavy lifts, including, *inter alia*, the SNAPPER Deck installation.

East River and Petitioner say that where the *only* loss suffered is the product's failure to perform as warranted and the parties are in a commercial relationship, remedies for breach of warranty and consequential damages are provided by contract/warranty law (including remedies available on breach of contract or a warranty's failure of essential purpose). Respondents and the Fifth Circuit say – contrary to *East River*'s express holding that damage to "other property" is recoverable in tort/strict liability[5] – that a contract pertaining to the "product itself" can be globally extended to any and all damage to persons or other property. Respondents' argument would limit William Higgins, an officer of McDermott who signed the initial contract, to free repair or replacement of the defective part of the crane, if he had been crushed when it broke.

Application of the alleged contractual waiver of tort liability, upon which Respondents wholly rely, also presupposed that AmClyde had fulfilled its warranty obligations by repairing or replacing the defective parts "free of charge." However, AmClyde did charge McDermott and lost its counterclaim at trial to collect those charges. The trial court's refusal, in the face of these and other genuine issues of fact, to submit McDermott's contract/warranty or tort/product liability cases on Shearleg Crane damages against AmClyde to the jury only amplifies the extent to

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[5] Strict liability should not be contractually waivable. Restatement (Second) of Torts § 402A, comment m (1965); *Pratt & Whitney Canada, Inc. v. Sheehan, et al.*, slip opinion, 1993 W.L. 183095 (Alaska May 28, 1993), surveying cases on reconsideration of *Northern Power & Engineering Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324 (Alaska 1981) in light of *East River*.

which the courts below have misconstrued and overreached this Honorable Court's decision in *East River*, unjustly to foreclose McDermott's recovery of genuine physical catastrophic damages under either tort or contract law from AmClyde.

Respondents' closing dissertation on "risk as a function of commerce" reflects a view repudiated in the common law nearly a century ago. *East River* plainly stated the most basic principle of tort/products liability: it is the business of the law, where an accident causes physical damage, to place responsibility upon the party best able to ameliorate the risk. AmClyde and River Don as designers, sellers and manufacturers of the Shearleg Crane and its hook were best positioned, as the jury's findings on causation show, to prevent the unreasonable danger that produced this catastrophe. The risk *which actually materialized* in this case was not purely economic, as commercial entities may reasonably bargain over; rather, it was the risk of an unreasonably dangerous, actually damaging product of huge proportions. No one expects to be or should be " . . . forced to bargain for reasonable product safety."[6]

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[6] "Note: *East River Steamship Corp. v. Transamerica Delaval, Inc.*: Admiralty Law – Recovery for Losses Caused by Product Self-Injury," 61 Tul.L.R. 1229 (1987).

B. McDERMOTT PRESERVED BOTH WARRANTY AND TORT CLAIMS FOR ITS SHEARLEG CRANE DAMAGES AGAINST RIVER DON AND AMCLYDE AND MUST BE PERMITTED TO TRY ITS DAMAGES UNDER ONE OR THE OTHER OR BOTH THEORIES TO A JURY.

Respondents only dispute McDermott's preservation of warranty claims against River Don, tacitly admitting that, at the least, McDermott has been denied the right to try its Shearleg Crane damages against River Don on tort theories. Since River Don's tort liability was determined in the trial court, this is an instance in which a summary remand for trial of the Crane damages, subject to the prior liability findings, would economically provide relief consistent with due process.

Respondents raise no further argument against McDermott's request for remand to try its Shearleg Crane damages against AmClyde under either tort or contract. AmClyde's liability under both theories having already been tried, remand for trial of the Crane damages only would also provide an economic remedy to the deprivation of due process suffered below.

McDermott requests that this Honorable Court review Respondents' quotations from the record in *pari materia* with the further argument and rulings in the trial court, excerpted at Petition Appendix pp. A-40-49, reflecting McDermott's objections to and request for reconsideration of the trial court's initial preclusion of all Crane damage evidence. The trial court's express acknowledgment and reference to preservation of McDermott's claims for crane damages and their receipt in

proffer, specifically for appeal, at Petition Appendix pp. A-48-49, could hardly be clearer. Moreover, McDermott filed a "Memorandum in Support of Motion to Reconsider Claims Denied Pursuant to East River," which expressly argued for its right to bring contract *and* tort-based claims against River Don *and* AmClyde for both Shearleg Crane and Deck damages.[7] The trial court's rulings must be understood in this context. Respondents do not merely ignore these facts, but based their argument on the fiction that physical pleadings in the trial and appellate records do not exist.

CONCLUSION

Petitioner prays that this Honorable Court grant a writ of certiorari to resolve the conflict and confusion in federal maritime law over whether a defendant may urge that it is not liable for an injury at trial, then obtain a credit for the pre-trial settlement of other defendants to whom the trial defendant pointed to mitigate its own comparative fault. Petitioner further prays for issuance of the writ of certiorari to review the Court of Appeals' erroneous denial of all recovery of any kind against AmClyde and the denial of recovery against River Don

[7] In light of Respondents' assertions, Petitioner reproduces this Memorandum in the attached Supplemental Appendix. It was also reproduced as Record Excerpt 3 attached to McDermott's "Petition for Rehearing En Banc" to the Court of Appeals.

for Shearleg Crane damages, and for all other relief to which Petitioner may be entitled herein.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MCDERMOTT, INC.

VERSUS

CLYDE IRON, RIVER DON CASTINGS LIMITED, BRITISH ROPES LIMITED AND INTERNATIONAL SOUTHWEST SLING INCORPORATED

CIVIL ACTION
No. H-88-2429
(Filed NOV 14 1990)

PLAINTIFF'S MEMORANDUM IN IN [sic] SUPPORT OF MOTION TO RECONSIDER CLAIMS DENIED PURSUANT TO EAST RIVER

MAY IT PLEASE THE COURT:

I. INTRODUCTION

River Don, before opening argument, raises an issue never before raised in the context of this litigation with application to River Don Castings. The pretrial order, as signed by River Don, does not, in the disputed issues of fact or law, challenge McDermott's legal right to recover, under tort or contract, from River Don Castings. Now, at this twelfth hour, counsel for Clyde, now River Don who settled with each other, minutes before trial, seeks to advance arguments previously advanced *only* on behalf of Clyde.

Counsel for Clyde *ne* River Don, sought orally to rely on *East River, Shipco, "Oxy Producer", Dreyfuss* and *Nicor* to protect River Don. In support of a theory that would relieve a manufacturer of defective parts from *any* liability for putting defective parts into the market place,

Counsel for River Don argues, without apparent authority, that 1) because of *East River* the only remedy when a product injuries itself is in contract, and, 2) there is no express contract between River Don and McDermott, 3) McDermott is without remedy. River Don argues, in effect, that unless the component maker becomes specifically part of the seller's contract that all rights in product liability are waived. This is a gross misstatement of law and fact. The true issues are: 1) Was the deck "other property" and 2) What remedy does McDermott have against River Don?

II. The Deck Section:

Nicor holds clearly that property such as the Deck, is "other property". In *Nicor*, which deals with the vessel, even though equipment had been *welded* to a vessel, it was still considered "other property." This "other property" was easily distinguishable because it was not the object of the contract that built the vessel. The court held:

> "Neither the added equipment nor the structural changes were "the object of the contract" between Halter and Nicor; the M/V Acadian Sailor, as delivered to Nicor, was the product of the bargain."

It is incomprehensible, even in light of River Don's rather outlandish claims that they believe fabrication of a Deck for Sohio was the product of any contract between McDermott and Clyde/River Don for a crane/hook.

The court further held:

> "These appurtenances must be considered "other property," separate from the product that

> the manufacturer originally sold, if the distinction enunciated in East River between a: "product" and "other property" is to have any meaning."

Counsel for Clyde/River Don relying exclusively on "cargo" cases says that the deck is not "other property". The court in *Nicor* answered this argument simply:

> "In a parenthetical description of another case, contained in a footnote, this court recently stated in Employers Ins. of Wausau v. Sawannee River Spa Lines, inc. that the "loss of cargo is not damage to 'other property' within [the] meaning of East River." That statement relies upon a similar observation in our earlier opinion in Louis Dreyfuss Corp. v. 27,946 Long Tons of Corn. To the degree, if at all, that these statements suggest that the additions to the vessel involved in this case are not "other property," they are *obiter dicta*, not precedent."

III. What remedies is McDermott entitled to against River Don for the Crane.

As stated counsel for River Don *ne* Clyde advances a novel theory of law: i.e., the only recovery available to an injured party when a product injuries itself is in contract, and if there is no contract then the party is simply out of luck. Fortunately, product liability does not operate so cavalier.

East River held as a threshold issue that:

> "a manufacturer *in a commercial relationship* has no duty under either a negligence or strict products-liability theory to prevent a product from

> injuring itself [*emphasis added*] *East River* at 476 U.S. at 870-871, 106 S.Ct. at 2302.

Shipco, which stated that the dissent by Judge Gee in *Jigg III* (which was overruled by *East River*) was consistent with the Supreme Court in *East River* quoted Gee:

> *"I would hold that the general maritime law should not and does not recognize a tort based product-liability cause of action based either on negligence or strict manufacturer liability when there is privity and when the only loss suffered results from damage to the defective product itself."*

Where is River Don's privity? In *Shipco*, Avondale was the manufacturer in privity with Shipco. McDermott has no express contract with River Don. McDermott did not negotiate with River Don. McDermott has no privity with River Don. McDermott has no commercial relationship with River Don. The question may be asked: What bargain is McDermott a beneficiary of? In *Shipco* the court held:

> In applying the rule adopted by *East River*, that one party to a commercial transaction cannot recover in tort for economic loss that arises from damage to the product itself but may recover for such loss that arises from damage to "other" property, appellants' argument arises [sic] the question – what is the product?

River Don and McDermott are not parties to a contract or a commercial transaction. As *Shipco* quoted *East River*:

> The underlying reason the Court in *East River* denied a tort cause of action to the purchaser for

> economic loss resulting from damage to the vessel was because such losses represent "the failure of the purchaser to receive the benefit of its bargain – traditionally the core concern of contract law. 476 U.S. at ___. 106 S.Ct. at 2302, 90 L.Ed. at 876."

Where in the McDermott/Clyde contract did McDermott waive its rights to remedies against third party manufacturers? Clyde states it does not warrant other manufacturers' products. In fact did not the contract specifically allow:

> "This warranty does not extend to normal wear and tear or to the equipment, materials, parts and accessories manufactured by others, and THE BUYER AGREES THAT IT MUST RELY SOLELY ON THE MANUFACTURER'S WARRANTIES APPLICABLE, AND THAT IT SHALL HAVE NO REMEDY AGAINST THE SELLER FOR BREACH OF A MANUFACTURER'S WARRANTY."

Now Clyde seeks to specifically breach the right it gave to McDermott to seek redress against manufacturers for parts it claims it did not warrant. Clyde uses *East River* as sword and shield by claiming privileges for parties to whom McDermott was unaware at the time the contact [sic] was negotiated. In effect, Clyde argues that if Clyde had had all parts manufactured by companies other than themselves, then McDermott would have no remedies because they disclaim specifically equipment not of its manufacturer and there are no contracts with the others. Where in law does it appear that a manufacturer receives blanket immunity because it is a third party? This is not law, this is a shell game.

Clyde/River Don relies on "Oxy Producer". Oxy Producer dealt with a service contract wherein Occidental had a negotiated contract with the designer. Clyde/River Don relies on *Nicor* because the engine manufactured by General Motors was a component part of the vessel built and sold by Halter. However, even though a component part maker, General Motors had a directly [sic] contract with Nicor:

> *"because the contract between General Motors and Nicor expressly disclaimed General Motors' liability for negligence arising out of the purchase of the engine, Nicor's claim does not fall into the possible exception to East River carved out by the Miller Industries and McConnell courts."*

As we can see, in each of the cited cases there existed a direct negotiated contract between the plaintiff and the component maker or service provider. In this case no such express contract exists. In each of the cited cases there was a benefit to the plaintiff through a negotiated commercial transaction between two parties, such is not the case here. This court has created an exception not found anywhere in law wherein a user of a product has been restricted from claims against a tort feasor because he did not have a direct express contract, which, if he had, would have abrogated the a [sic] tort remedy. Without any express contract between McDermott and River Don, there is no negotiation or commercial transaction and therefore this court cannot limit remedies against River Don. To do this is absolutely contrary to all products liability since *MacPherson v. Buick Motors Co.*, 217 XY 382, 389 111 N.E. 1050, 1051, 1053 (1916). To leave such a ruling standing is clearly reasonable [sic] error.

IV. WARRANTIES BY RIVER DON

McDermott claims implied warranties from River Don. If McDermott moves breach of implied warranties by River Don, McDermott is allowed full recovery including damages to the crane. Failure to allow McDermott to discuss crane damages is reversible error by the court.

V. WARRANTIES BY CLYDE

McDermott claims breach of contract, breach of express warranties, and the failure of essential purpose. If the court does not allow the plaintiff to address damages to the crane which would be recoverable if any of these issues is proven, it is reversible error by the court.

WHEREFORE, Plaintiff, McDermott moves this court to prevent a material and reasonable matters previously decided [sic]. *Effect of East River-* McDermott, Inc. reurges its previously filed memoranda on the proper interpretation by reference. Furthermore, McDermott objects to the court's ruling. This opposition memoranda in Response to River Don's Motion was prepared overnight *during trial* in response to a "surprise" Motion of which this counsel was presented copy *at trial* today. This issue had never been raised previously by River Don. It is not listed as a contest [sic] issue of law by River Don in the pretrial order signed two working day's before trial. McDermott's counsel was given no opportunity to file a response before being called into judge's chambers, unprepared, to orally argue the merits at approximately 12:00 noon. The court announced its ruling before opening arguments and instructed McDermott's counsel to not

make any reference to Shearleg Crane damage either in opening argument or during the pendency of trial.

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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The following opinions, decisions, judgments, and excerpts from the record herein have been omitted in printing this Joint Appendix because they were previously reproduced on the following pages of the Appendix to the Petition for a Writ of Certiorari. They are listed here in chronological order:

Receipt, Release and Settlement Agreement (Appendix pp. A-59-65);

Abstracts of "Crane" and "Deck" damages (Appendix pp. A-66-67);

Jury Interrogatories (Verdict) (Appendix pp. A-35-39);

Trial Court Ruling on "Credit for Settlement" issue (Appendix pp. A-51-53);

Trial Court Judgment on Verdict (Appendix pp. A-54-56);

Judgment of Dismissal of Sling Defendants (Appendix p. A-57);

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MCDERMOTT, INC. — CIVIL ACTION

VERSUS — No. H-88-2429

CLYDE IRON, RIVER DON CASTINGS LIMITED, BRITISH ROPES LIMITED AND INTERNATIONAL SOUTHWEST SLING INCORPORATED AND HENDRIK VEDER, B.V.

RELEVANT TRIAL COURT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
7-18-88	1	ORIGINAL COMPLAINT w/JURY DEMAND, filed. SUMMONS issued (4)
7-22-88		RETURN OF SUMMONS ISSUED to:
	2	River Don Casting Limited on July 18, 1988
	3	Clyde Iron, A Unit of AMCA International on 7-18-88
	4	International Southwest Sling Incorp on 7-18-88
	5	British Ropes Limited on 7-18-88 filed dkt'd 7-22-88 sa
8-19-88	6	Deft's [International Southwest Sling, Inc.] ORIGINAL ANSWER W/JURY DEMAND. dkt'd 8-22-88 sa
8-22-88	7	ORIGINAL ANSWER of Deft British Ropes Ltd, filed. dkt'd 8-23-88 sa
		* * *
11-14-88	10	ORIGINAL ANSWER of Deft, Clyde Iron, filed. dkt'd 11-14-88 sa

11-30-88	11	ORIGINAL ANSWER OF DEFT, River Don Castings Limited, filed. dkt'd 12-1-88 sa
		* * *
5-4-89	16	CLYDE IRON'S CROSS-CLAIM, filed. eod 5-5-89 kg
5-10-89	17	FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL adding Hendrik Veder B.V., filed eod 5-3-89 sa
6-5-89	18	ORIGINAL ANSWER of Deft Hendrik Veder B.V., filed. eod 6-6-89 bj
		* * *
9-25-89	27	Clyde's MOTION for PARTIAL SUMMARY JUDGMENT, filed. eod 10-2-89 bj M/D 10-16-89 by clerk
		* * *
10-19-89	35	Deft Clyde's 3RD-PTY COMPLAINT against McDermott Marine Contractors, Inc. & Hudson Engineering, Inc., filed. eod 10-19-89 dj
10-19-89	36	Deft Clyde's COUNTERCLAIM against pltf, filed. eod 10-19-89 dj
		* * *
11-6-89	38	MEMORANDUM IN OPPOSITION TO CLYDE'S MOTION FOR PARTIAL SUMMARY JUDGMENT, filed. eod 11-8-89 jd
		* * *
11-28-89	40	(DH) ORDER, entered., parties ntfd. The MOTION FOR PARTIAL SUMMARY JUDGMENT is DENIED. bj

11-30-89	41	MCDERMOTT'S REPLY TO COUNTERCLAIM OF CLYDE IRON, filed. eod 12-7-89 cj
11-30-89	42	Hudson and McDermott's ANSWER TO THIRD PARTY COMPLAINT, filed. Atty: Lea eod 12-7-89 cj
		* * *
2-5-90	46	Pltf's MOTION TO DISPOSE OF SLINGS, filed. (opposed) M/D 2-26-90 eod 2-6-90 dj
2-5-90	47	Pltf's MEMO IN SUPPORT of MTN TO DISPOSE OF SLINGS, filed. eod 2-6-90 dj
		* * *
3-14-90	57	Deft. AmClyde MEMORANDUM IN OPPOSITION TO MOTION TO DISPOSE OF SLINGS, filed. eod 3-19-90 ymm
		* * *
4-6-90	70	(DH) ORDER, entered. Parties ntfd. Pltf's MTN TO DISPOSE OF SLINGS is DENIED. eod 4-6-90 dj
		* * *
5-8-90	78	Deft Bridon Ropes LTD's FIRST AMENDED ANSWER, filed. eod 5-8-90 bj
		* * *
8-1-90	142	SECOND AMENDED COMPLAINT by Pltf. McDermott, Inc., filed. eod 8-1-90 ymm
		* * *

8-28-90 159 (DH) CONSENT TO PROCEED BEFORE A MAG., entered Parties ntfd. Ordered that this matter is assigned to Mag.Kelt. to conduct all further proceedings, including final judgment. eod 8-29-90 hs

* * *

9-14-90 162 Clyde's MOTION FOR RECONSIDERATION OF MOTION FOR PARTIAL SUMMARY JUDGMENT, filed.
M/D 10-4-90 eod 9-17-90 pv

* * *

9-14-90 165 Defts' Bridon Ropes Ltd.'s, International Southwest Sling, Inc.'s and Hendrik Veder, B.V.'s JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST McDERMOTT, INC., filed.
eod 9-20-90 bj

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10-17-90 180 Pltf's OPPOS. TO DEFTS BRIDON ROPES, ET AL'S MTN FOR PARTIAL SUMMARY JUDGMENT, filed.
eod 10-26-90 kds

* * *

10-17-90 184 Pltf's RESPONSE IN OPPS. TO CLYDE'S MTN FOR RECONSIDERATION OF MTN FOR PARTIAL SUMMARY JUDGMENT AND PLTF'S MTN FOR PARTIAL SUMMARY JUDGMENT, filed. eod 10-26-90 kds

* * *

10-31-90 189 Defts Bridon Ropes, Ltd.'s, International SW Sling, Inc.'s, & Hendrik Veder, B.V.'s JOINT REPLY BRIEF TO MCDERMOTT, INC. OPPOSITION TO DEFT'S JOINT MTN FOR PARTIAL SUMMARY JUDGMENT, filed. eod 11-6-90 ymm

* * *

11-5-90 192 AmClyde's MEMORANDUM IN OPPOSITION TO McDERMOTT'S MOTION OF PARTIAL SUMMARY JUDGMENT AND RESPONSE TO McDERMOTT'S OPPOSITION TO AmCLYDE'S MOTION FOR PARTIAL SUM. JUDGMENT, filed. eod 11-6-90 ymm

* * *

11-7-90 197 (GAK) ORDER, entered. Parties ntfd.
1. Deft, International Southwest Sling, Inc.'s UNOPPOSED MOTION FOR LEAVE TO FILE AMENDED ANSWER (Instrument #182) – GRANTED.
2. Clerk shall file deft's FIRST AMENDED ORIGINAL ANSWER TO PLTF'S SECOND AMENDED COMPLAINT with the papers of this cause.
eod 11-8-90 fas

11-8-90 198 Deft's FIRST AMENDED ORIGINAL ANSWER TO PLTF'S SECOND AMENDED COMPLAINT, filed.
eod 11-8-90 fas

* * *

11-7-90 200 Deft Hendrik Veder B.V.'s FIRST AMENDED ANSWER, filed (copy).
eod 11-8-90

11-5-90 201 Deft. River Don Castings' ORIGINAL ANSWER to Clyde Iron's Cross Claim, filed. eod 11-9-90 pv

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11-12-90 205 Deft. AmClyde MOTION IN LIMINE TO EXCLUDE TESTIMONY and/or EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES, filed. eod 11-15-90 hs

11-12-90 206 MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE TESTIMONY and/or EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES, filed. eod 11-15-90 hs

* * *

11-13-90 208 (GAK) JURY TRIAL – DAY 1, filed. App. A.J. Lea & R. Moseley f/pltf; R.E. Couhig & T. O'Brien & Ronald Blask local counsel f/defts 1 & 2; D.J. Gonsoulin f/deft #2 (Mtn to withdraw is GRANTED); H.K. Watson & R. Boemer f/deft #3; d. Dursum & E Hunter f/deft #4; J.C. Arnold f/deft #5. Settlements announced between pltf & deft 3, 4 & 5. A 60 day order to dismiss all claim with prejudice in exchange of payment of $1 million w/i 60 days will be entered. Deft's Mtn in Limine to Exclude Testimony . . . is GRANTED; Deft's Mtn in Limine is Sustained in part & Overruled in part. Order filed. Deft's Mtn in Limine to have judgment entered is DENIED. eod 11-15-90 hs

11-13-90 209 McDermott Incorp's MOTION IN LIMINE TO PRECLUDE THE INTRODUCTION BY DEFT'S OF INADMISSIBLE EVIDENCE, filed. eod 11-15-90 hs

* * *

11-13-90 213 (GAK) ORDER, entered Parties ntfd. Ordered that opposing cnsl, and through cnsl., any and all parties and/or witnesses called on behalf of the Pltf are instructed to refrain from any mention or interrogatory, any offering of documentary evidence, concerning those paragraphs set out above corresponding to deft AmClyde, A Unit of AmClyde International, Inc.'s Motion in Limine which this Ct has sustained, w/o first requesting and obtaining a ruling from the Ct outside the presence and hrg of all prospective jurors and jurors ultimately selected in this case, with regard to any alleged matter as presented in the aforementioned paragraphs of the mtn in Limine that this Court has this day sustained. SEE ORDER FOR DETAILS. eod 11-15-90 hs

11-13-90 214 (GAK) ORDER GRANTING SUBSTITUTION OF COUNSEL, entered Parties ntfd. Robert E. Couhig and Thomas G. O'Brien are substituted as cnsl of record f/the deft, River Don Castings Limited. eod 11-15-90 hs

11-14-90 215 Pltf's MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER CLAIMS DENIED PURSUANT TO EAST RIVER, filed. eod 11-27-90 pv

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11-14-90	218	(GAK) JURY TRIAL – DAY 2, filed. (Rptr: Taped) Appearances: Lea, Couhig, O'Brien (Outside presence of jury-pltfs Motion to reconsider claims denied pursuant to East River is DENIED). Testimony begins Rule invoked. (Break) Testimony continues. Ct adjourns until 9:00 am on 11-15-90. eod 11-27-90 pv
11-15-90	219	(GAK) JURY TRIAL – DAY 3, filed. (Rptr: Taped) Appearances: same as day 2. Outside presence of jury – Pltf requests permission to make arrangements to transport jurors to see the "hook". Both sides to prepare briefs by 11/16/90. Testimony resumes. (break) Testimony continues. (lunch) Testimony continues. (break) Outside presence of jury-Defts wish to recall witness at a later time. Ct will allow defts to recall witness for direct examination only. Defts elect to continue cross-exam now. Jury returns; testimony continues. Ct adjourns until 9:00 a.m. on 11/16/90. eod 11-27-90 pv

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11-16-90	223	(GAK) JURY TRIAL – DAY 4, filed. (Rptr: taped). Appearances: same as Day 2. Testimony resumes. (break) Testimony continues. (Lunch) Testimony continues. (Break) Testimony continues. Jury excused at 4:24 p.m. Parties heard in argument re pltfs Motion to Permit Jury to View Evidence – GRANTED* Pltf

will provide transportation. No testimony will be given at the site. A Ct reporter & USM will be requested for purpose of the trip. Ct adjourned until 11/20/90 at 9:00 a.m. eod 11-27-90 pv

* * *

11-19-90	225	Pltfs' MOTION TO ADMIT INTO EVIDENCE AMCLYDE EXHIBITS, filed. eod 11-27-90 pv
11-19-90	226	Pltfs' MOTION TO ADMIT INTO EVIDENCE RIVER DON CASTING EXHIBITS, filed. eod 11-27-90 pv
11-19-90	227	Pltfs' MOTION TO ADMIT INTO EVIDENCE THEIR UNOPPOSED EXHIBITS, filed. eod 11-27-90 pv
11-19-90	228	Defts' MEMORANDUM IN OPPOSITION TO PLTFS MOTION TO RECONSIDER CLAIM DENIED PURSUANT TO EAST RIVER, filed. eod 11-27-90 pv
11-19-93	229	(GAK) JURY TRIAL – DAY 5, filed. (Rptr: Taped) Appearances: same as Day 2. Exhibits discussed outside presence of jury. Testimony resumes. Jury excused at 10:28 a.m. (break) Testimony continues. Jury excused for lunch. Discussion of exhibits (Lunch) If parties can reach an agreement as to any statements that may be made or questions asked at the site of the hook, the Ct will permit. (break) Testimony continues. Jury excused at 2:55 for break. Testimony continues. Ct will recess until 8:45 a.m. on 11/20/90 at which time jurors, Ct, attnys, personnel will go view an exhibit. eod 11-27-90 pv

* * *

11-20-90 232 (GAK) MINUTES OF JURY TRIAL – DAY 6, filed. (Rptr: taped). Appearances same as Day 1). Deft object to going to view pltf exhibit 33. Joint stipulation filed. Pltf oral motion in limine re Kenneth Packer is granted in that parties must approach bench prior to asking questions. eod 12-4-90

11-20-90 233 JOINT STIPULATION regarding hook on Shearleg crane. eod 12-4-90 pg

11-20-90 234 JOINT STIPULATION regarding exhibits. eod 12-4-90 pg

11-20-90 235 (GAK) MINUTES OF JURY TRIAL – DAY 7, filed. (Rptr: taped). Appearances same as Day 1) eod 12-4-90

* * *

11-21-90 238 JOINT STIPULATION, FILED. eod 12-6-90 hs

11-26-90 239 (GAK) JURY TRIAL – DAY 8, filed. Appearances same as Day 2. Defts mtn f/directed verdict is DENIED. Defts mtn for dollar f/dollar credit for the million dollar settlement between pltf & Dire (sic) Rope if judgment is for the pltf is taken under advisement. Defts mtn for pltf to call Dr. Caulifed as part of their case in chief is DENIED. eod 12-6-90 hs

11-26-90 240 JOINT STIPULATION, filed. eod 12-6-90 hs

11-27-90 241 (GAK) JURY TRIAL – DAY 9, filed. Appearances same as Day 2. Testimony resumes (Break 10:31-10:36) Testimony continues. Court adjourns until 9 a.m. on 11-28-90. eod 11-6-90 hs

11-27-90 242 WRITTEN DEPOSITION TESTIMONY, filed. eod 12-6-90 hs

11-28-90 243 (GAK) JURY TRIAL – DAY 10, filed. Appearances same as Day 2. Testimony resumes. (Outside presence of jury: Defts until (sic) provide the Ct with terms of the agreement between the defts in the case. The document will be placed under seal.) (Lunch) Testimony continues. (Break: 3:30-4:00) Testimony continues. Jury excused @ 5:14 p.m. Proposed jury charges are due Mon. 12-3-90. Ct. adjourns until 9 a.m. on 11-29-90. eod 12-6-90 hs

* * *

11-29-90 248 (GAK) JURY TRIAL – DAY 11, filed. Appearances same as Day 2. Testimony resumes. (Break 10:33-11:03) Testimony continues. Jurors excused or lunch at 11:58 am (Lunch) Jury returns at 1:47. Testimony continues. (Break 3:33-4:03) Objections to depo. Jury returns @ 4:38 p.m. Court adjourns until 11-30-90 @ 9 a.m. eod 12-6-90 hs

* * *

11-30-90 252 (GAK) JURY TRIAL – DAY 12, filed. Appearances same as Day 2. Pltf proffers their exhibit # 305. Testimony resumes (break 10:36-11:03) Testimony continues. (Lunch) Testimony continues.

(break 2:46-3:18) Testimony continues. Jury excused @ 5:00 until 12:30 p.m. on 12-3-90. Jury charge conf. et @ 5 p.m. on 12-3-90. eod 12-6-90 hs

* * *

12-3-90 255 (GAK) JURY TRIAL – DAY 13, filed. Appearances A. Lea & R. Moseley f/pltf; R. Couhig & T. O'Brien f/defts. Testimony resumes (break 2:33-3:00) Testimony continues. Court adjourns until 9 am on 12-4-90. Proposed jury charge conf. will be held later on the date. eod 12-6-90 hs

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12-4-90 259 (GAK) JURY TRIAL – DAY 14, filed. Appearances A. Lea & R. Moseley f/pltf; R. Couhig & T. O'Brien f/defts. Testimony resumes. Deft rests 9:32 am. Jury excused while parties make mtns. Pltfs (sic) mtns for instructed verdict are DENIED and GRANTED. Granted as to failure of essential purpose. Defense reads proffer into the record. Jury returns & is excused at 10:10 am until 9:30 am on 12-5-90. Discussion of exhibits. (Break 1:27-1:42) Discussion continues. Charge conf. begins @ 2:15. eod 12-6-90 hs

12-3-90 260 (GAK) ORDER, entered. Parties ntfd. Ordered that deft International Southwest Sling Incorp. Unopposed Motion for Leave to Files its First Amended Answer is hereby in all things GRANTED. The Clerk of this Court is ORDERED to file defts First Amended

Answers among the official papers in this matter. eod 12-6-90 hs

* * *

12-12-90 264 (GAK) ORDER, entered. Parties ntfd. Pltf shall have judgment with prejudice against deft British Ropes, Limited; International Southwest Slings, Inc., and Hendrik Veder, B.V., jointly and severally in the total sum of $1,000,000.00 subject to the right of pltf to refile within 60 days. Each of the parties shall bear its own costs and attorneys fees. eod 12-14-90 fas

* * *

11-12-90 265 Deft AmClyde's PROPOSED SPECIAL INTERROGATORIES TO THE JURY, filed. eod 12-20-90

* * *

11-12-90 269 Deft AmClyde's MOTION IN LIMINE TO HAVE JUDGEMENT ENTERED OR ALTERNATIVELY TO HAVE JURY INSTRUCTED, filed. eod 12-20-90 fas

11-12-90 271 Deft's PROPOSED JURY CHARGES, filed. eod 12-20-90 fas

11-12-90 272 AmClyde's TRIAL MEMORANDUM, filed. eod 12-20-90 fas

* * *

12-5-90 273 (GAK) JURY TRIAL – DAY 15, COURTROOM MINUTES held 12/5/90, filed. (Rptr: Taped) Appearances same as Day 14. Attorneys make general objections to jury charge and interrogatories. Closing arguments. (Jury excused @ 2:00).

Court continues @ 2:44 p.m. Jury charge @ 4:05 p.m. Alternate juror excused from case. Jury excused until 9:00 a.m., on 12/6/90 to begin deliberating.
eod 12-20-90 fas

12-5-90 274 Pltf's PROPOSED JURY CHARGES, filed. eod 12-20-90 fas

* * *

12-6-90 276 (GAK) COURTROOM MINUTES, JURY TRIAL – DAY 16, held 12-6-90, filed. (Rptr: Taped) Appearances same as Day 14. (Jury deliberations begin @ 9:00 a.m.). court responds to jury notes 1 and 2 in presence of counsel and jury. Request for note pads is granted. Testimony of witnesses (written) and the pads written on by witnesses will not be given to the jurors. (Jury note #3 – jurors break from 10:25-11:00). (Lunch 12:15-1:20 w/deliberations continuing afterward). *Chambers conference: Proffers of evidence by pltf and exhibits withdrawn by defts. Jury advised to resume deliberations @ 9:00 a.m., on 12/7/90. eod 12-20-90 fas

* * *

12-7-90 278 (GAK) COURTROOM MINUTES, JURY TRIAL – DAY 17, held 12-7-90, filed. (Rptr: Taped) Appearances same as Day 14. (Jury deliberations continued @ 9:00 a.m.). Verdict reached and read and filed. Jury polled at request of defense counsel. Jury discharged from service 12/8/90. Responses are due 12/21/90. Court adjourned. eod 12-20-90 fas

* * *

12-7-90 280 EXHIBIT LIST OF AMCLYDE, filed.
eod 12-20-90 fas

12-7-90 281 EXHIBIT LIST OF MCDERMOTT, filed.
eod 12-20-90 fas

12-7-90 282 EXHIBIT LIST OF RIVER DON CASTINGS LIMITED, filed.
eod 12-20-90 fas

12-7-90 283 JURY INTERROGATORIES, filed.
eod 12-20-90 fas

* * *

12-7-90 285 JOINT PRE-TRIAL ORDER, filed.
eod 12-20-90 fas

12-17-90 286 JOINT MOTION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE POST-JUDGMENT MOTIONS, filed.
eod 12-20-90 fas

12-17-90 287 MEMORANDUM IN SUPPORT OF JOINT MOTION TO EXTEND TIME TO FILE POST-JUDGMENT MOTIONS, filed. eod 12-20-60 fas

12-17-90 288 (GAK) ORDER, entered. Parties ntfd.

1. All parties given until 12-18-90, to file any Post-Trial Memoranda of Law. The time for filing responses to such Memoranda is 12-21-90.
2. Any post-trial motions, including Motion for Judgment Non Obstante Verdicto, and Motion for New Trial be extended in accordance with the Federal

Rules of Civil Procedure to provide 10 days after the entry of Judgment by the Court.

12-18-90 289 POST-JUDGMENT MEMORANDUM OF LAW REGARDING CREDIT FOR SETTLEMENT WITH SLING DEFTS w/attached Judgment, filed.
eod 12-20-90 fas

1-9-91 290 COPY OF DEFTS' (sic) OPPOSITION TO CLYDE AND RIVER DON'S POST TRIAL MEMORANDUM, filed (w/ another file stamp marking of 12-21-90)
eod 1-11-91 fas

1-11-91 Rec'd Ltr from Atty Rockne L. Moseley requesting that a copy of executed "Receipt, Release & Settlement Agreement" be substituted for copy prev. filed 12-21-90 as Exhibit "A" to McDermott Inc.'s Oppos. to Clyde & River Don's Post-Trial Memorandum, fwd to CRD.
eod 1-17-91 kds

1-11-91 291 JOINT MOTION TO DISMISS WITH PREJUDICE AS OF COMPROMISE & SETTLEMENT, filed.
eod 1-17-91 kds

1-14-91 292 (GAK) *MEMORANDUM/ORDER* entered & ptys ntfd. Defts' mtn for a Hernandez credit is DENIED. (SEE ORDER FOR REASONS)
eod 1-17-91 kds

1-15-91 293 (GAK) *JUDGMENT* entered & ptys ntfd. The jury verdict awarding total damages in the amount of Two Million, One Hundred Thousand Dollars ($2,100,000.00) w/no pre-judg. interest,

be reduced by thirty percent (30%), reflecting that percentage of fault allocated to pltf, McDermott, Inc., for a total damages award of One Million Four Hundred Seventy Thousand Dollars ($1,470,000.00) Judg. in favor of Pltf & against AmClyde for a total amount of Six Hundred Seventy-Two Thousand Dollars ($672,000.00) (SEE ORDER FOR REMAINING DETAILS OF JUDGMENT).
eod 1-17-91 kds

1-24-91 294 (GAK) ORDER, entered. Parties ntfd. Defts' Bridon Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V. are DISMISSED WITH PREJUDICE.
eod 1-25-91 mac

1-28-91 295 Pltf's MOTION FOR POST-JUDGMENT RELIEF, filed. M/D 2-17-91 by the clerk.
eod 1-30-91 mac

1-28-91 296 MEMORANDUM IN SUPPORT OF PLTF'S POST-JUDGMENT MOTIONS, filed.
eod 1-30-91 mac

1-30-91 297 Defts AmClyde's MTN FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR ALTERNATIVELY, MTN FOR NEW TRIAL, filed. M/D 2-19-91 by clerk.
eod 2-4-91 fas

1-30-91 298 Deft AmClyde and River Don Castings, Ltd's MEMORANDUM IN SUPPORT OF MTN FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR ALTERNATIVELY, MTN FOR NEW TRIAL, filed.
eod 2-4-91 fas

1-31-91 299 Pltf's MEMORANDUM OF SUPPLEMENTAL AUTHORITY, filed.
eod 2-5-91 fas

1-31-91 300 (GAK) FINAL JUDGMENT, entered. Parties ntfd. Judgment is entered against deft Clyde Iron and River Don Castings in accordance with the Judgment signed on 1-15-91. This cause is DISMISSED with prejudice as to Bridon Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V. only. This is a FINAL JUDGMENT.
eod 2-5-91 fas

* * *

2-11-91 305 TRANSCRIPT OF JURY CHARGES on 12-5-90 before Magistrate Kelt, filed (LOOSE IN FILE). eod 2-13-91 fas

* * *

2-19-91 308 Pltf's MEMORANDUM IN OPPOSITION TO AMCLYDE AND RIVER DON CASTINGS, LTD.'S MTN FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR ALTERNATIVELY FOR NEW TRIAL, filed. eod 3-07-91 fas

3-5-91 309 Pltf's UNOPPOSED MTN FOR DISPOSAL OF SLINGS, filed.
eod 3-17-91 fas

* * *

2-20-91 311 Deft's (AmClyde and River Don Castings, Ltd's) NOTICE OF APPEAL from the jury verdict rendered on 12/7/90, the MEMORANDUM/ORDER signed on 1/14/91, the JUDGMENT signed on 1/15/91 and entered on 1/17/91, the

FINAL JUDGMENT signed on 1/31/91 and entered on 2/5/91, filed.
eod 3-11-91 jd

* * *

3-8-91 314 Deft's NOTICE OF APPEAL, as a cross-appeal as to all matters which has been or may be raised by plaintiff/appellant, McDermott, Inc., in its appeal, filed.
eod 3-11-91 jd

3-11-93 315 Pltf's NOTICE OF APPEAL from the final judgment entered 2/5/91 and cross-appeal as to all matters which may be raised by defendants, filed.
eod 3-11-91 jd

* * *

3-12-91 316 (GAK) ORDER, entered. Parties ntfd. Deft's MTNS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR NEW TRIAL, are DENIED.
eod 3-13-91 fas

3-12-91 317 (GAK) ORDER, entered. Parties ntfd. Pltf's MTN FOR DISPOSAL OF THE SLINGS is GRANTED. eod 3-13-91 fas

* * *

3-14-91 319 (GAK) ORDER, entered. Parties ntfd. Pltf's MOTION FOR POST-JUDGMENT RELIEF (#295) is DENIED.
eod 3-14-91 fas

3-14-91 320 (GAK) SUPERSEDING FINAL JUDGMENT, entered. Parties ntfd. All mtns seeking relief under rules 50 and 59 of the F.R.C.P. are DENIED. A FINAL

JUDGMENT is entered in this case. This is a superseding FINAL JUDGMENT.
eod 3-14-91 fas

3-14-91 321 (GAK) MINUTES OF BILL OF COST HEARING held 3/14/91, filed. Appearances O'Brien f/AmClyde and River Don Castings; Moseley f/McDermott. Pltf's Bill of Costs GRANTED in part and DENIED in part. Thomas G. O'Brien to draft proposed ORDER to be submitted to Mr. Moseley for concurrence prior to submission to the Court.
eod 3-17-91 fas

3-26-91 322 PLTF'S SUPERSEDING NOTICE OF APPEAL, from the superseding final judgment filed. Filing and docketing fees not paid. eod 4-2-91 jd

* * *

4-2-91 323 PLTF'S MTN FOR RECOVERY OF ADDITIONAL ITEMS IN BILL OF COSTS, filed. M/D 4/22/91 by clerk. *(Strike Order Prepared* – No separate proposed order.) eod 4-5-91 fas

* * *

4-5-91 325 DEFT'S NOTICE OF APPEAL from Judgment entered 2/5/91, and superseding final judgment entered 3-14-91, filed. eod 4-10-91 dlm

* * *

4-19-91 327 (GAK) ORDER, entered. Parties ntfd.
1. Pltf's MTN FOR RECOVERY OF ADDITIONAL COST (#323) is DENIED.

2. Taxable costs are awarded in favor of pltf and against the deft, AmClyde, a Unit of AMCA International, Inc., and River Don Castings Limited in the amount of $30,502.46 as follows (SEE ORDER IN FILE FOR FURTHER DETAILS).
eod 4-22-91 fas

4-19-91 328-355 Crtrptr Judicial Transcribers TRANSCRIPT of proceedings held 11/13/90 through 12/7/90. Trial (Volumes 1-28) filed. (Individual entries for each volume deleted on reproduction for Joint Appendix.) eod 5-1-91 km

5-10-91 RECORD ON APPEAL FORWARDED TO THE COURT OF APPEALS consisting of 11 volumes of original pleadings, 36 volumes of transcript; 4 expandable folders of large pleadings (#'s 164, 165, 184, 187, 204, 285), 1 expandable folder of sealed pleading (#275) 18 binders and 15 expandable folders of trial exhibits.

* * *

2-8-93 359 Certified Copy of USCA JUDGMENT, REVERSING in part and as modified, affirmed in part in accordance with the OPINION of this Court, filed.
eod 2-9-93 bpw

2-8-93 360 Certified Copy of USCA OPINION, filed. eod 2-9-93 bpw

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-2246

McDERMOTT, INC.
Plaintiff/Appellee/Cross-Appellant

v.

AmCLYDE, A DIVISION OF AMCA INTERNATIONAL, INC. and RIVER DON CASTINGS, LTD.
Defendants/Appellants/Cross-Appellees

RELEVANT COURT OF APPEALS DOCKET ENTRIES*

4-4-91	McDermott Incorporated Notice of Appeal
4-15-91	AmClyde and River Don Notice of Appeal
5-15-91	Record on Appeal Filed – 49 Vols.
5-15-91	Six boxes of Exhibits and one sealed envelope filed
5-16-91	Motion of Appellants, AmClyde and River Don to Dismiss Appeal of McDermott Incorporated

* This chronological listing of docket entries relating to substantial matters in the Court of Appeals was abstracted by counsel from the Court of Appeals' docket, which is not purely chronological in form.

7-5-91	Order Denying With Reasons Appellants' Motion to Dismiss Appeal of McDermott Incorporated
9-30-91	Motion of Appellants to Supplement Record filed
9-30-91	Appellants' Brief filed
10-2-91	Appellants' Motion to Supplement the Record granted
11-30-91	Appellee's/Cross-Appellant's Brief filed
12-3-91	Cross-Appellant's Motion for Leave to File Record Excerpts in Excess Pages and Motion for Leave to Supplement Record (UNOPPOSED – GRANTED – rev. 12-11-91; Send Motion and Clerk's letter to SC Judge)
1-28-92	Appellant's Reply Brief/Response to Cross-Appellee's Brief filed
2-11-92	Cross Appellant's Reply Brief filed
6-1-92	Case Argued by Appellants and Appellee
12-11-92	Opinion signed and rendered; Judgment filed and entered
1-12-93	Appellee/Cross-Appellants' Petition for Rehearing En Banc filed
2-4-93	Judgment as and for the Mandate issued to Clerk; Record on Appeal returned to Clerk; Exhibits returned to Clerk
3-29-93	Notice of filing Certiorari Petition on 3-12-93
7-6-93	Order of Supreme Court: Granted 6-28-93
7-23-93	Preparing Proceedings on Certiorari

TRIAL TRANSCRIPT EXCERPT

[November 14, 1990, Transcript Vol. 1, p. 3]

[Plaintiff's Announcement Of Partial Settlement]

[3]

MR. LEA: Yes, sir. Over the weekend, Your Honor, serious negotiations started with the sling Defendants. And I use the three gentlemen here collectively as sling Defendants. And it was – we received final authority Monday morning, and the settlement was bound. I know it was a federal holiday. I did call the Court and left a message in an attempt to – to inform the Court. And we did notify the other parties. In fact, I think they were notified that it was highly likely the case would settle on Saturday; but over the weekend, we couldn't get formal authority until Monday. The terms of the settlement are that McDermott will dismiss all claims with prejudice against the three sling Defendants in exchange for the payment of one million dollars, and I think 60 days was –

* * *

TRIAL TRANSCRIPT EXCERPT

[November 14, 1990, Transcript Vol. 1, p. 21]

[Plaintiff's Acceptance Of Responsibility For Sling Defendants' Share Of Damages]

[21]

THE COURT: Do you think there are going to be many objections on the basis of relevancy or anything along those lines?

MR. LEA: I think there's going to be great deal on the basis of relevancy in view of the settlement. That's – that's – that's because –

(Pause – attorneys conferring)

MR. LEA: And let me tell you where I'm coming from, Your Honor. There used to be a question of who was responsible for the sling failure; McDermott, because they should have known better than to use it or the product manufacturer because he failed to warn. okay. If we accept responsibility, then the reasons of knowledge, failure to warn, to me become very irrelevant, because it's like admitting liability in a personal injury case and saying let's try it on damage. Very similar. And you – you don't go back and talk about the events that led to the responsibility. You just tell the jury I have responsibility, and I plan on doing that. So why would we want to go back and reargue a case that's already been settled?

* * *

TRIAL TRANSCRIPT EXCERPT

[November 14, 1990, Transcript Vol. 1, p. 76-78]

[Opening Statement Of Counsel For Plaintiff]

[76]

sling manufacturer – I don't think their names are important, and the sellers of the sling. All parties, after the litigation got started and tests started being done and things like this, realized that there were no manufacturing defects in the slings; i.e., they didn't make them wrong, they didn't put them together wrong. What they did is the problem with the slings and the reason that it would only carry twice of its safe working load, rather than four times, is that the right hand and the left hand lay slings were combined, and that resulted in, as I told you before, a weakening. It went from four to one to two to one. Now, McDermott's original suit against the sling manufacturers was that they should have warned them not to put right hand and left hand lay slings together. The sling manufacturer's distributors responded by saying: McDermott's a big corporation; you're a sophisticated user, we don't need to warn you of defects that you knew about or, with the exercise of reasonable care, you should have known about. Now, remember I talked about amicable settlements before and we only go to Court when you can't reach an amicable settlement. McDermott became convinced, as I told you earlier, that the slings played little, if any, part in the casualty. So, therefore, McDermott and the sling manufacturers got together in exchange for a fractional amount of McDermott's damages, settled the case; and McDermott has dismissed them from the proceeding. No action was ever filed

against them by any other party. So, the case before you, the

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jury, has now been greatly simplified. And that may be a comforting factor because otherwise we would have three more Defendants in the case and the trial would be much longer. They're gone now. Okay. And because they're gone though, the case has become simple because, to the extent that you find that the hook was improperly manufactured and designed, well, then to that extent McDermott contends they should be allowed to collect their significant damages from River Don, if it's manufacture, design, Clyde, or core testing, combination of both of them. To the extent that you, the jury, find that the sling paid any part in the casualty to the ex – or that you – you're going to determine what part it did play. And whatever part you determine that it did play, then because of the settlement with McDermott and British Wire Ropes – oop, I'm sorry, the sling manufacturers and distributers, then McDermott has to bear the responsibility for that, because that's what they paid us to do. Okay. Now, McDermott contends and we'll prove through eyewitness testimony that the hook failed first while performing the job it was intended or designed to perform, lifting heavy offshore structures. One thing I forget to mention to you is the load it was lifting the – called a Sohio Snaffer Deck (sic), the load weighed less than the ten million pounds that the sling manufac – I mean, excuse me, that the hook manufacturer, River Don and Clyde, guaranteed that it would be able to safely lift. We will prove that the breakage of this hook proximately caused McDermott

[78]

severe damage. Moreover, we'll prove to you that even if the sling parted first and caused and increased load on the hook, a properly designed and manufactured hook would have been able to take that weight, and not fail. In any event, we will show you that even if you believe that the sling went first, in that event, all – the only damage McDermott would have suffered would have been the loss of that sling and nothing else. Now, River Don and Clyde are going to try to refute McDermott's eyewitness testimony with theories of experts and probably what I'd like to call light shows. Okay. That's where you go back and you – you go make a movie of what you – you want it to show, and you show it to somebody and you put enough color and spectacular and flashing lights, then you – you expect somebody to say, well, that must be what happened. You know what this amounts to?

* * *

TRIAL TRANSCRIPT EXCERPT

[November 29, 1990, Transcript Vol. 10, p. 2085]

[Argument Of Counsel On Evidentiary Objections]

[2085]

MR. LEA: I think he's intermixing apples and oranges here. Judge –

THE COURT: Splice and things.

MR. LEA: Yes, splicing them together and not unravelling them. But what the – Your Honor, the real question is: you can be negligent all day, but you're only responsible for the damage your negligence cause absent an allegation of punitive damage which nobody's made here. You're negligent. You're negligent. You're responsible for the result of your action. He's trying to go back and prove something he doesn't have to prove; that is, we had knowledge of something and to the extent the slings caused the accident, to that extent, we're responsible. We're acknowledging, and you [sic] charge is sling. You're only responsible for the damage you do, and to the extent the slings caused damage, to that extent because of McDermott and the sling manufacturer's settlement, we bear the responsibility. You don't have to go prove something because what they prove can only lead to a finding of responsibility, and you're only responsible for the direct consequences of your own act, and we've already said, we're responsible for the slings, any part they played in it. Thank you.

* * *

TRIAL TRANSCRIPT EXCERPT

[November 29, 1990, Transcript Vol. 10, p. 2096]

[Argument Of Counsel And Colloquy With Court On Evidentiary Objection And Credit For Settlement]

[2096]

MR. MOSELEY: We stipulated, he doesn't.

MR. COUHIG: I don't think as a cor – as a – I am very concerned and I don't want to get into the big brouhaha again as to how this effects, for example, I'm entitled to my *Hernandez* I believe credit for the fault of – or for the settlement.

THE COURT: Well –

MR. LEA: That doesn't effect it.

THE COURT: That doesn't effect this and that's going to be somewhere down the line. You're going to have a tough time with that since they have – that *Hernandez*, as I read it and perhaps I'm wrong, as I understand that of course is to prevent double recovery for anything.

MR. COUHIG: That's correct.

THE COURT: In other words, you can't get –

MR. COUHIG: He can't get 3.5 million dollars. He could get 2.5 million dollars.

THE COURT: No. That's not what – if – well, all right, you may be right if that's all he was suing for. Say he sued for 2.5 million dollars and he recovered 2.5 million dollars and they had this other million dollars, you're entitled to credit. No question about it under

Hernandez. But the problem, as I see it from your situation, and I may be wrong, but the problem as I see it from your situation, he's got two million dollars damage to the rig that he ain't going to be able

* * *

TRIAL TRANSCRIPT EXCERPT

[November 29, 1990, Transcript Vol. 10, p. 2104]

[Defendants' Requested Instruction To Jury Regarding Plaintiff's Acceptance Of Responsibility For Sling Defendants' Share Of Liability]

[2104]

(Jury panel enters the Courtroom)

THE COURT: Be seated please. All right, Mr. Couhig. Oh, wait a minute. Members of the jury, McDermott, Incorporated admits that to the extent that the slings are at fault for the accident that occurred on the 10th of October of 1986 for any reason whatsoever then McDonald – then McDermott is legally responsible for that portion of the fault. All right.

* * *

TRIAL TRANSCRIPT EXCERPT

[December 5, 1990, Transcript Vol. 25, pp. 2840, 2847]

[Closing Argument By Counsel For Plaintiff]

[2840]

The next thing is I informed that openly that we had settled with the sling manufacturer, and I said that because of the settlement, we had bought peace. Our differences were resolved. And I told you that because of that settlement, whatever fault you found on the slings, whether McDermott had ever been right or wrong, or the sling manufacturers were right or wrong to put it on McDermott because we're responsible. I told you that then, and we haven't denied it since. The next thing I've told you that we would prove, and promised you that we would prove, is that Clyde guaranteed that this crane and hook could safely list in excess of 10,000,000 pounds.

* * *

[2847]

The next thing they promised you was that they would discredit one, or two, or three of the McDermott witnesses who would state that the hook broke first, and that they would prove that they would make it virtually impossible to believe McDermott's witnesses. I'm going to talk to you about that in just a second because I think the eye witnesses are a very, very strong part of our case. The next thing they promised to prove to you is that the blaming of the hook and the blaming of Clyde and River Don was after thought until we settled with the sling manufacturers on Friday. Now it really wasn't Friday. It was Monday, right before we opened up. I think if you'll

think back on the evidence, the really quarrel that Clyde and River Don had been telling you they had with McDermott is all they would do is blame the hook from day one. That was what they suggested to you, but yet, now they're telling you we never thought about the hook until we settled with the sling manufacturers on the day before trial? That isn't borne out. The next thing they promised to prove to you, through circumstantial and direct evidence, was that the sling arrangement was the sole and only cause of the accident. That means the sling went first. It didn't.

* * *

TRIAL TRANSCRIPT EXCERPT

[December 5, 1990, Transcript Vol. 25, pp. 2854, and 2880-2881]

[Closing Argument Of Counsel For Defendants]

[2854]

MR. COUHIG: There is so much evidence over here you can hardly walk. We started the case by suggesting to you that this accident happened as a result of the fault of McDermott. Recall the words improper planning, not doing their homework, failing to communicate with each other. I believe I suggested in the opening statement not that I would be able to tear apart their witnesses, but that no person from McDermott would come forward and take responsibility for the sling arrangement that was there, putting together the right hand and the left hand, acting in contravention to common sense. Let me, if I might, review certain of the testimony.

* * *

[2880]

MR. COUHIG: At the end of the day the evidence proves that this hook was capable. The law, I believe the Court will tell you, is a thing is defective only if it's unreasonably dangerous; that is, it doesn't do what it's designed to do. This hook did what it was designed to do. Read the John Hey letter. It doesn't suggest anything of the scenario that they did. That's a veiled attempt to try and suggest I don't know what. I – We puzzle over that all the time. What we know happened is this. The hook and the crane were tested and tested and tested. The hook would have failed before if there was a problem

with the hook. The hook would have failed before if they had rigged it improperly. It would be interesting to ask the person who decided to use the right hand and left hand slings whether he knew or not, but McDermott accepts responsibility for that. This was not a problem with the hook, but with the sling. Let me suggest to you – And I believe I may be getting near the end of my time. I know as a – as a defendant you always hate to go, you know, because you know he's going to come up and say this. And – and then you'd like to jump up and say well, wait, wait, wait, let me say that. I object a lot, incidentally,

* * *

[2881]

because I believe in certain things and I think I have an obligation to do it. I've asked the Judge to tell you all that a few times, and he has because it's my obligation. But the ver – the questions that you have ask [sic], the very first question: Was the hook defective? The answer is no. You have to go on then – if you find that it was, was it a legal cause of this accident? Those are two distinct issues. So, if you find it was defective, it's possible to find it wasn't a legal cause. But then if you find that it was a legal cause, you have to figure out whether it was design, some failure of materials, some failure of one (sic), some misrepresentation, all of which the Court will tell you. And then you have to figure out whose fault it is, but the Judge will tell you in the – in the interrogatory the sling was the cause. And then you have to, if you get down to this point, apportion the damages among Clyde, among River Don, among McDermott and Hudson. Hudson

Engineering is the company, incidentally, that Mr. Whitcomb works for. They designed the sling arrangement. And then they will want you to figure out, if you answer all those, what amount of money to compensate McDermott for causing their own failure.

* * *

TRIAL TRANSCRIPT EXCERPT

[December 5, 1990, Transcript of Jury Charges, Doc. 305, R.O.A. Vol. 47, pp. 27-29, 41, 43-46]

[27]

* * *

Negligence is a legal cause of damage if it directly and in natural and continuous sequence produces, or contributes substantially to producing such damage, so that it can reasonably be said that except for the negligence, the loss, injury, or damage would not have occurred or would not have been as great. Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as the negligence and if the negligence contributes substantially to producing such damage. If a preponderance of the evidence does not support the plaintiff's claim, then your verdict should be for the defendants. If, however, a preponderance of the evidence does support the plaintiff's claim, you will then consider the defense raised by the defendants. The defendants contend that the plaintiff was himself negligent and that such negligence was a legal cause of his own injury. Specifically, the defendant claim – the defendants claim that plaintiff

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was negligent in misusing cable laid slings and overloading the hook. This is a defensive claim, and the burden of proving that claim by a preponderance of the evidence, is upon the defendants who must establish: One, that the

plaintiff was also negligent; and that such negligence was a legal cause of the plaintiff's own damage. If you find in favor of the defendants on this defense, that will not prevent recovery by the plaintiff. It only reduces the amount of plaintiff's recovery. In other words, if you find that an accident was due partly to the fault of the plaintiff, that his own negligence was, for example, ten percent responsible for his own damage, then you would fill in that percentage as your finding on the special verdict form which I will later explain to you – or which I will explain in a moment. Such a finding would not prevent the plaintiff from recovering; the Court would merely reduce the plaintiff's total damages by the percentage that you insert. Of course, by using the number ten percent as an example, I did not mean to suggest to you any specific figure at all. If you find that the plaintiff was negligent, you might find one percent or ninety-nine percent, or any other percent that you think is reasonable under the circumstances. If the evidence proves negligence on the part of the defendants which was a legal cause of damage to the plaintiff, you should award the plaintiff an amount of money that will fairly and adequately compensate him for such damage. You are instructed that the failure of a sling at a load less

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than its rel – than its rated minimum breaking strength is a cause of damage to the deck. If the sling had not failed, damage to the deck from the hook failure would have been substantially lessened.

* * *

[41]

You should consider the following elements of damage to the extent you find them proved by a preponderance of the evidence an [sic] no others. A defendant cannot be held liable for damages that he has not been shown to have caused. The measure of such damage to Plaintiff's property is the reasonable cost of returning Plaintiff and its property to pre-accident condition.

* * *

[43]

And the jury interrogatories are thirteen in number, and the first jury interrogatory: Do you find from a preponderance of the evidence that the hook was defective in any of the ways alleged, and you will answer "yes" or "no". Then if you answer "yes", then you will go to interrogatory number two. If you answer "no", then you will skip the balances of the interrogatories and you will go to interrogatory number twelve. All right, interrogatory two: If the answer to Interrogatory One – Number One was "yes", do you find by a preponderance of the evidence that the hook was a legal cause of the damages; and then you will answer "yes" or "no" to that, and if you answer "yes" to that, you will then go to Interrogatory Number 3. And In – Interrogatory Number 3, if the answers to Interrogatories 1 and 2 were "yes", do you find from a preponderance of the evidence that the defect was, and there are four possibilities: one of design, either "yes" or "no"; one of materials or workmanship, and answer either "yes" or "no"; and then a failure to

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warn and you would answer either "yes" or "no"; and then one of misrepresentation, and then you would answer "yes" or "no". And then Interrogatory Number 4, if the defect was one of materials or workmanship, do you find by a preponderance of the evidence that the negligence or fault of any of the following was a cause of the defect, and that will be (a) River Don Castings, and as to River Don Castings, you will answer "yes" or "no"; AmClyde, and as to them, you will answer either "yes" or "no"; and then as to McDermott Incorporated, you will answer either "yes" or "no". All right. Now, then, Interrogatory Number 5: You have been instructed that the failure of the sling at a load less than its rated minimum breaking strength is a cause of damage to the deck and crane. If you have also answered interrogatories 1 and 2 "yes", please state what proportion or percentage of plaintiff's damages you find from a preponderance of the evidence to have been legally caused by the fault of the respective parties. And then again, you will answer in percentage as to AmClyde, River Don Castings, McDermott as well as the sling Defendants, and then Hudson Engineering, so there are four different parties that you would have to come to a percentage on, and then the total of that should total one hundred percent. All right. Six: Do you find by a preponderance of the evidence that AmClyde breach any express warranties in addition to the manufacturing warranty found in the original contract in regard to the hook as designed by the Plaintiff, and you will answer

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either "yes" or "no". Seven: If so, do you find that AmClyde's breach of these express warranties was a producing cause of the damages suffered by McDermott, Inc., and you will answer either "yes" or "no". Interrogatory 8: Do you find by a preponderance of the evidence that AmClyde breached any implied warranties in regard to the hook as alleged by Plaintiff, and you will answer "yes" or "no". Number 9: If so, do you find that AmClyde's breach of implied warranty is a producing cause of the damages suffered by McDermott, Incorporated, and you would answer "yes" or "no". Number 10: What sum, in dollars, without regard to the percentages of fault of any party, do you find from a preponderance of the evidence is required to compensate McDermott, Incorporated for damages to the deck as the result of this accident, and you will enter a dollar amount. As to Interrogatory 11: Do you find by a preponderance – Do you find by a preponderance of the evidence that McDermott, Incorporated is entitled to pre-judgment interest, and then, if so, what percent interest.

MS. SPEAKER: (Indiscernible).

THE COURT: Yes, I'm changing that because of prior – and you will put – you will decide what percent interest should be paid and would insert that percentage. Interrogatory 12: Do you find by a preponderance of the evidence that AmClyde is entitled to be compensated by the replacement of the hook and associated charges, and you will answer either "yes" or "no". And Interrogatory 13: State what sum, in dollars, without regard to

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the percentage or fault of the party, do you find from a preponderance of the evidence is required to compensate Clyde for the replacement of the hook, and you will state a dollar amount. All right. If, during your deliberations – No, wait a minute. You will take the verdict form; that is the stipulation, to the Jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill it in, sign – date and sign it, and return to the Courtroom.

* * *

SUPREME COURT OF THE UNITED STATES

No. 92-1479

McDermott, Inc.,

Petitioner

v.

AmClyde and River Don Castings, Ltd.

ORDER ALLOWING CERTIORARI. Filed June 28, 1993.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted limited to Question 1 presented by the petition.

June 28, 1993

No. 92-1479

In The

Supreme Court of the United States

October Term, 1993

McDERMOTT, INC.,

Petitioner,

vs.

AmCLYDE, A DIVISION OF AMCA INTERNATIONAL, INC. and RIVER DON CASTINGS, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Should the injured plaintiff in a maritime case who settled with three of five defendants be doubly penalized and defendants who forced the matter to trial be doubly rewarded by the Court of Appeals' deduction of *both* the full dollar amount of the settlement *and* the settling defendants' proportionate share of liability from plaintiff's judgment?

LIST OF PARTIES

Parties to the proceedings below were the petitioner McDermott, Inc., the respondents AmClyde, a division of AMCA International, Inc. (formerly "Clyde Iron"), River Don Casting, Ltd., and defendants British Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V.

RULE 29.1 LIST

The parent corporation of McDermott Incorporated is McDermott International, Inc.

Subsidiaries, Affiliates and Partnerships of McDermott International, Inc. (Excluding Wholly-Owned Subsidiaries)

Davy McDermott, Ltd.
Initec, Astano Y McDermott International Inc., S.A.
Malmac Sdn. Bhd.
McDermott Arabia Company, Ltd.
McDermott-ETPM, Inc.
P.T. McDermott Indonesia
McDermott Incorporated
B&W Mexicana, S.A. de C.V.
Babcock & Wilcox Beijing Company, Ltd.
Diamond Power Hubei Company, Ltd.
Babcock & Wilcox Gama Kazan Teknolojisi Anonim Sirketi
Thermax Babcock & Wilcox Private, Ltd.
Hudson Northern Industries, Inc.
Rotovent S.A. de C.V.
Diamond Power (Australia) Pty., Limited

RULE 29.1 LIST – Continued

Halley & Mellowes Pty., Ltd.
Heerema-McDermott (Aust.) Pty., Ltd.
HeereMac
Panama Offshore Chartering Company, Inc.
McDermott (Nigeria), Limited
McDermott Scotland, Limited
MMC – McDermott Engineering Sdn. Berhad
P.T. Babcock & Wilcox Indonesia
P.T. Bataves Fabrications
Topside Contractors of Newfoundland, Ltd.
Arabian Petroleum Marine Construction Company
DB/McDermott Company
Abahsain Hudson Heat Transfer Co., Ltd.
Construcciones Maritimas Mexicanas, S.A. de C.V.
ASEA Babcock PFBC
B&W Fuel Company
B&W Nuclear Service Company
Babcock-Ultrapower Jonesboro
Babcock-Ultrapower West Enfield
Diamond Power Specialty, Limited
Espacialidades Termomecanicas S.A. de C.V.
Babcock & Wilcox Services, Inc.
KBW Gasification Systems, Inc.
North American CWF Partnership
Palm Beach Energy Associates
Maine Power Services
PowerSafety International, Inc.
South Point CWF

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No. 92-1479

In The

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 979 F.2d 1068 (5th Cir. 1992), and is reprinted in the Appendix to the Petition herein at p. A-1. The denial of petitioner's request for rehearing en banc, also treated by the Court of Appeals as a request for panel rehearing, is reported at 985 F.2d 555 (5th Cir. 1993) and reprinted in the Appendix to the Petition herein at p. A-32. The verdict, memoranda decisions, and judgments of the United States District Court for the Southern District of Texas (Houston Division) (U.S. Magistrate Judge

George A. Kelt, Jr.) are not reported. They are reprinted in the Appendix to the Petition herein at p. A-33.

JURISDICTION

Petitioner invoked federal jurisdiction under 28 U.S.C. §§ 1332 and 1333, bringing suit in the U.S. District Court for the Southern District of Texas, Houston Division. A jury trial was held 13 November – 17 December 1990. At the outset of trial, a "sixty-day order of dismissal" was entered on plaintiff's settlement of all claims against defendants, British Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V. (hereinafter referred to as "sling defendants").

After trial, the court took the case under advisement and considered briefing on the non-settling defendants', AmClyde and River Don Casting, Ltd.'s (hereinafter jointly referred to as "hook defendants") Motion for Credit for the sling defendants' settlement. The court duly denied the hook defendants' motion for a *"Hernandez"*[1] credit and entered judgment on the verdict, 17 January 1991. McDermott and the hook defendants each sought relief from adverse aspects of the judgment under Federal Rules of Civil Procedure 50 and 59, which was denied and a "Superseding Final Judgment" entered 14 March 1991.

Petitioner and Respondents filed timely Notices of Appeal and prosecuted their appeal and cross-appeal to

[1] *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir. 1988), *cert. denied*, 488 U.S. 981 (1989).

the Court of Appeals for the Fifth Circuit. On 11 December 1992, the panel opinion of the Court of Appeals was filed. Petitioner applied for rehearing en banc, which, along with panel rehearing, was denied, 25 January 1993.

The jurisdiction of this Court to review the judgment of the Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. § 1254(1). McDermott, Inc.'s Petition for a Writ of Certiorari was filed 12 March 1993 and a Writ of Certiorari was granted by this Court on 28 June 1993.

STATUTES INVOLVED

All statutes involved are referenced in the "Jurisdiction" section, *supra*.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

McDermott, Inc. filed a complaint with jury demand on 18 July 1988 in the United States District Court, Southern District of Texas, Houston Division. Named defendants and served were River Don Castings, Ltd., Clyde Iron, a Division of AMCA International (later known as AmClyde), International Southwest Slings, Inc. (hereinafter, "ISSI"), and British Ropes, Ltd. The complaint was amended to add defendant Hendrik Veder B.V., 3 May 1989, and Clyde Iron filed its cross-claim for contribution and indemnity against River Don Castings, Ltd., 4 May 1989. Each defendant answered, defending in part on grounds that someone other than themselves or plaintiff

was responsible for plaintiff's damages (Southern District of Texas Record Doc. Nos. 6, pp. 2214-15; 7, p. 2197; 10, p. 2181; 11, p. 2174; 18, p. 2020).

AmClyde filed a motion for partial summary judgment, seeking dismissal of McDermott's tort/products liability claims against it on 25 September 1989. AmClyde then filed a third party complaint against Hudson Engineering, Inc., a sister company of McDermott, Inc., and a counter-claim against McDermott for the cost of AmClyde's warranty replacement of the Shearleg crane's defective, broken main hook, 19 October 1989 (S.D. Tex. Record Document Nos. 35 and 36). AmClyde's Motion for Partial Summary Judgment was denied on 28 December 1989.

On 28 August 1990, pursuant to the parties' consent, the case was referred to Magistrate Judge Kelt to conduct all further proceedings, through trial and entry of final judgment.

AmClyde, in a coordinated effort by defendants, moved for reconsideration of its previously denied Motion for Partial Summary Judgment, while the "sling defendants," British Ropes, ISSI, and Hendrik Veder also filed a Motion for Partial Summary Judgment, all on 14 September 1990. Said motions were duly opposed by McDermott and plaintiff countered with its own Motion for Partial Summary Judgment against AmClyde on 17 October 1990. There is no express ruling on these motions in the record, though convening trial indicated their denial. Plaintiff and the three "sling defendants" reached a settlement, the day before trial, of McDermott's claims against them, for damage to both the SNAPPER deck and

the Shearleg crane, in exchange for one million dollars, to be paid within sixty days (Joint Appendix, p. 26 and Petition Appendix pp. A-59-65.)

Trial began 13 November 1990. That morning, defendants AmClyde and River Don announced that they had entered into a settlement whereby they would join their defense under one counsel, that previously of AmClyde, alone. Hook defendants claimed the settlement terms were confidential and said settlement was filed under seal. AmClyde also reurged the substance of its previously denied Motions for Partial Summary Judgment in a Motion in Limine, as well as arguments that the SNAPPER deck was not "other property," seeking entry of judgment relieving AmClyde of all liability. The court, in part, granted summary judgment on AmClyde's motion, and extended it to River Don, denying McDermott any recovery against them, whether in tort or contract/warranty, for damages to the Shearleg crane (sometimes hereinafter, "crane damages"). Record excerpts reflecting the trial court's ruling, amounting to a partial summary judgment, are included in the Petition Appendix, p. A-40. McDermott stipulated, by virtue of its settlement with the sling defendants, that it accepted responsibility for any damages which the jury found were caused by the sling's failure (Joint Appendix pp. 27-31, 33-35, 40 and 42). AmClyde abandoned its cross-claim. The trial went forward to the jury, therefore, solely on the issues of liability and damages to the SNAPPER deck (sometimes hereinafter "deck damages") and AmClyde's counter claim for the cost of replacing the defective hook.

McDermott objected to and sought reconsideration of the trial court's preclusion of its case for damages to the

Shearleg crane under both tort and contract prongs of *East River*[2]. Upon denial of reconsideration, at the outset of trial, 14 November 1990, and at the close of its case, 6 December 1990, McDermott proffered the evidence of its Shearleg crane damages (Petition Appendix pp. A-41-43 and A-49-50). A summary, per Federal Rules of Evidence Rule 1006, of these damages, proffered for the trial record, is reproduced in the Petition Appendix with the summary of deck damages actually admitted in evidence at pp. A-66 and 67.

The jury returned its verdict, 7 December 1990, finding AmClyde 32% liable, River Don, 38% liable, and "McDermott/Sling defendants" 30% liable for the accident (Petition Appendix, p. A-37). The jury apportioned causation rather than fault, primarily due to the combination of warranty, tort, and strict liability theories presented. No liability was attributed to Hudson Engineering on AmClyde's third party demand and the jury found against AmClyde and in favor of McDermott, denying AmClyde's counter-claim for the cost of the replacement hook (Petition Appendix p. A-37 and 39). The jury found McDermott's damages, to the SNAPPER deck alone, were $2,100,000.00 (Petition Appendix p. A-38).

The trial court withheld judgment to consider the hook defendants' request for credit from the plaintiff's settlement with the sling defendants. The trial court duly denied the hook defendants' motion for a "dollar for

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[2] *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 865 (1986).

dollar" credit from the sling defendants' settlement, finding that McDermott had not received full compensation due to preclusion of recovery for its "crane damages" (Petition Appendix pp. A-51-53). Judgment was entered on the verdict in accordance with the jury's allocation of liability by causation: $672,000 against AmClyde, $798,000 against River Don, and deducting $630,000 reflecting the combined contribution to the accident of McDermott, Inc. and the "sling defendants;" and awarded McDermott its costs as prevailing party (Petition Appendix pp. A-54-56).

Plaintiff and Defendants filed timely motions for new trial, judgment notwithstanding the verdict, and/or to alter or amend the judgment. Defendants' Motion for judgment N.O.V. and for new trial was denied 13 March 1991. Plaintiff's Motion for Post-Judgment Relief was denied 14 March 1991 and final judgment entered (Petition Appendix p. A-58). McDermott and hook defendants filed timely notices of appeal to the Court of Appeals for the Fifth Circuit.

The hook defendants, designated appellants/cross-appellees in the Fifth Circuit and McDermott, as appellee/cross-appellant duly prosecuted their appeals. The Fifth Circuit rendered an opinion 8 December 1992 which was withdrawn for recalculation of the judgment with "settlement credit"[3] and replaced by the opinion of 11

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[3] The Court of Appeals had deducted the $1 million settlement credit, then the proportionate reductions, 30% for McDermott/Sling defendants and 32% for AmClyde (implicitly rejecting joint and several liability), yielding a judgment against River Don of $418,000.

December 1992 (Petition Appendix pp. A-1-32). McDermott prevailed on appeal in that it was awarded a money judgment, albeit reduced to $470,000.00, against River Don. McDermott's verdict and judgment against AmClyde were summarily vacated, denying all recovery under tort or contract theories. The Fifth Circuit also refused to notice a box-full of proffered evidence in the record of McDermott's Shearleg crane damages, and denied McDermott its right to present this evidence to a jury in a warranty action against River Don. McDermott timely petitioned the Fifth Circuit for rehearing en banc.

The Fifth Circuit, treating McDermott's petition for rehearing en banc as one for panel rehearing and rehearing en banc, denied both by Order dated 25 January 1993 (Petition Appendix p. A-33-34). McDermott submitted its Petition for a Writ of Certiorari to review the Fifth Circuit's ruling herein within ninety days from filing of the Court of Appeals' decision and same was marked "received" by the Clerk of the Supreme Court, 12 March 1993. This Honorable Court granted a writ of certiorari herein, limited to the first issue presented by the petition, on 28 June 1993 (Joint Appendix p. 43).

B. STATEMENT OF FACTS

McDermott, Inc. was supplied a marine heavy lift crane with a warranted capacity of 5000 short tons, plus ten percent impact load by Clyde Iron (now "AmClyde") at a cost of approximately $7 million. The crane's main hook was obtained by AmClyde from River Don Castings, Ltd. The crane's self-stowing design led to its nomination as the "Shearleg." On 10 October 1986, the

Shearleg crane, mounted aboard McDermott's preexisting barge, the Intermac 600 (hereinafter "I600"), was attempting its first offshore lift: an approximately 4100 short ton oil and gas production platform called the "SNAPPER deck", which McDermott had built and was to install for its client on a structural steel base, known as a "jacket", affixed to the floor of the Gulf of Mexico, off the Texas coast, East Breaks block 165. Shortly after the Shearleg crane lifted the SNAPPER deck from its transport barge, one huge prong of the Shearleg's main hook broke off and plummeted down into the top of the SNAPPER deck. An eleven inch diameter, steel cable-laid sling, supplied by British Ropes through ISSI, then immediately unraveled at its "eye-splice," dropping half the 4100 ton deck down onto its separate transport barge and causing it to sway, striking the boom of the Shearleg crane. The shock of these sudden, massive load shifts wrought havoc with the stability of the I600, the SNAPPER deck's transport barge, and the integrity of the crane's heavily loaded cable reeving. Over one hundred people, including an AmClyde representative, were either near or aboard the I600 at the time of this incident, many of whom were in easy striking distance of snapping steel cables or collapsing steel components. Most of the I600's passengers ran away from the working end of the crane boom. At least one person was injured in the rush. Fortunately, McDermott's crane operator suppressed panic and immediately began to lower the part of the SNAPPER deck still dangling from the remains of the hook, thus relieving the tension on the crane and averting further disaster.

The Shearleg crane and SNAPPER deck were towed back to McDermott's fabrication facilities for repairs.

McDermott was obligated to deliver the SNAPPER deck, installed and fully operational on a tight schedule. Therefore, McDermott had to contract with its primary competitor to lift and set the SNAPPER deck at a cost, for the lifting services alone, of approximately $300,000.00. McDermott accomplished the repairs to the SNAPPER deck, set it on location, and delivered it to its client.

The Shearleg crane, however, required extensive repairs. *Inter alia*, the main hook had to be replaced; damaged steel cable reeving had to be replaced; sections of the crane boom had to be repaired or replaced, all due to damage received when the hook broke on 10 October 1986. Another offshore deck installation required the Shearleg crane on 8 December 1986. McDermott completed its repairs by that time, but had to adapt the crane's block to use another hook, as AmClyde had not yet provided a replacement for the broken one.

On 10 October, McDermott advised AmClyde and British Ropes of their products' failures, and on 13 October 1986 made a call in warranty against AmClyde. Shortly thereafter, McDermott and AmClyde agreed to send the failed hook to Packer Engineering for metallurgical and mechanical tests and analysis, in an effort to determine the cause of its failure. Packer's tests and analysis indicated that the hook did not meet required specifications and, particularly, found substantial cast-in flaws on the fracture surface that were involved in the failure of the hook. This information, combined with eyewitness observations, corroborating evidence gleaned from analysis of the structural damage to the deck, and the position of the broken prong when it imbedded in the SNAPPER deck, all showed that the hook was defective

and that its failure, more probably than not, precipitated the accident of 10 October 1986. AmClyde obtained a contrary analysis, laying blame on the cable-laid sling's failure and blaming the sling's failure on an alleged "unwinding" effect produced by linking Hendrik Veder's "left hand" and British Ropes' "right hand" cable-laid slings together end-to-end.

AmClyde denied McDermott's warranty claim for the replacement hook and repairs, claiming that the hook did not cause the accident, although the contract warranty provision called for free replacement of "defective" parts regardless of whether they caused an accident. McDermott, acting under close schedule constraints for the Shearleg crane in its offshore construction projects, reserved its rights and issued purchase orders, as demanded by AmClyde, to obtain a new hook and AmClyde's services to repair the crane. A replacement hook was finally delivered and installed just before the Shearleg began a tow to West African offshore construction sites, 28 May 1987. AmClyde, for its part, at all times maintained charges against McDermott for the replacement hook, regardless of its defects, because it blamed the cable laid sling failure for the 10 October 1986 accident. The present action ensued.

SUMMARY OF ARGUMENT

The Court of Appeals' grant to the hook defendants of a dollar for dollar credit of McDermott's settlement with the "sling defendants," against judgment liability,

despite the determination of the "sling defendants' " liability at trial, demonstrates how needless deviation from fundamental legal principles creates fundamental injustice. The Court of Appeals, in the present case, as in its preceding *Hernandez* decision, blindly followed what appeared to be a bright-line rule without critical consideration of the limited legislative context of its genesis (i.e. the Longshoreman's and Harborworker's Compensation Act[4]), its legal basis or lack thereof in principles of contribution, joint and several or solidary liabilities of joint tort-feasors, set-off, privity of contract, and comparative liability in maritime law. The lower court's opinion loosely interchanges "offset" (Petition Appendix pp. A-25, 28), "set-off" (Petition Appendix pp. A-25, 27) and "credit" (Petition Appendix pp. A-25-29); but mentions no legal basis for its use of these terms. The result is actually double enforcement of a presumed, unproven contribution right in favor of hook defendants – first, *pro rata* or proportionately against McDermott, Inc.'s money judgment, then *pro tanto*, against the sling defendants' settlement, though neither contribution nor any of the other legal principles implicated are discussed. The question not asked by the Court of Appeals and unanswered by the hook defendants is: by what right do hook defendants claim any benefit from a private settlement agreement to which they were not parties?

The Court of Appeals' *pro tanto* credit for settlement functions much like a set-off; but a set-off is:

> A counter demand which defendant held against plaintiff, arising out of a transaction

[4] 33 U.S.C. § 901 *et seq.*

> extrinsic to plaintiff's cause of action. . . . Only a counter demand upon which defendant at commencement of the action might have maintained independent suit [against plaintiff].

Black's Law Dictionary 1538 (Rev. 4th Ed.). River Don urged no such counter demand against any party herein, nor was there any extrinsic transaction between River Don and plaintiff which could have given rise to such a demand. AmClyde, the other "hook defendant," lost at trial on its counter-claim for the price of the replacement hook. The hook defendants did not and cannot claim a "set-off" of the settlement against their liability in tort. Nor is the enforced contribution by McDermott/sling defendants to satisfaction of the hook defendants' liability a "credit". "Credit" is " . . . the deduction of a payment made by a debtor from an amount due. . . . " from the debtor. The American Heritage Dictionary (2nd College Ed. 1982). Neither McDermott nor the sling defendants were shown to be indebted to the hook defendants; rather, the contrary is true.

In fact, what the Court of Appeals did, was to grant the hook defendants dollar for dollar contribution from the sling defendants through their settlement payment, on top of proportionate contribution per the jury's apportionment of 30% causation to the sling failure, attributed to "McDermott/Sling defendants" by the jury. This double contribution was given the hook defendants automatically, with no showing of any entitlement to contribution and without consideration of the lack of commonality between the sling defendants' settled liability for Shearleg crane damages and the hook defendants' liability for the damages to the SNAPPER deck alone – despite the

trial court's express recognition of this fatal defect in the hook defendants' claim for some credit for the settlement.

Contribution requires, at the outset, an identity of, or "joint" liability for the same damages between the parties. The burden to establish a right to contribution lies with the party claiming it. *Boyett v. Keene Corp.*, 815 F.Supp. 204, 208-210 (E.D. Tex. 1993) and cases cited therein. Hook defendants demonstrated no identity of liability and damages between them and the sling defendants for the crane damages to which the settlement is, at least in part, attributable. Hook defendants cannot do so without admitting joint liability for the crane damages.

Even as to deck damages, the sling defendants' liability in settlement was not "joint" with the hook defendants' adjudicated liability in tort. Hook defendants would have to establish themselves third-party beneficiaries to the settlement agreement to benefit therefrom. The settlement terms do not admit of any construction favoring the hook defendants; therefore, they could not establish third party beneficiary status. The only joint liability between the sling defendants and hook defendants arises from McDermott's acceptance of liability on the part of the "sling defendants," upon which the jury allocated damages through comparative causation. If, as the Fifth Circuit opined, this allocation of liability is meaningless *vis a vis* the sling defendants, then there is no basis for any joint liability between hook and sling defendants. Thus, no right to any contribution is established. On the other hand, if the 30% aggregation of McDermott's and the sling defendants' objective parts in causing the accident is accepted and the hook defendants'

judgment liability reduced thereby, any claim for contribution is extinguished. Contribution must, on this record, be *pro rata*, not *pro tanto*. There is simply no legal basis for hook defendants to claim a dollar for dollar "credit," "set-off," or "contribution" from McDermott's settlement with the "sling defendants."

Nor should a party who opts to go to trial be forced in the exercise of that right to risk a greatly disproportionate share of responsibility for damages due to a settlement with other defendants. In the present case these concerns were alleviated by McDermott's acceptance of responsibility, on its own and the sling defendants' behalf, for the sling's failure, leaving only apportionment of causation among objective actors in the casualty for the jury. Thus, the sling defendants' absence from trial prevented neither plaintiff nor the hook defendants from properly prosecuting their sides of the case.[5] McDermott had contended from the outset that the defective hook was the primary cause of the accident, while the hook defendants' primary contention was that McDermott's rigging arrangement of the slings was the precipitating cause. Thus, the parties at trial were able to fully litigate the comparative contributions of the various actors to the deck damage sustained by McDermott. The jury's apportionment of 30% causation to "McDermott/sling defendants," while exonerating Hudson Engineering, the

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[5] One upper-level employee of a sling defendant, Hendrik Veder, Herman Alberts, testified as an expert witness on behalf of the hook defendants, offering his opinion that the accident was primarily the result of the "right to left" cable laid sling unwinding phenomenon. Trial Transcript Vol. 19, November 29, 1990, Doc. No. 346, R.O.A. Vol. 30, pp. 2010-11.

designer of the sling arrangement, amply demonstrates that the parties and the jury gave careful consideration to evidence of the slings' role in the accident. Thus, hook defendants received their contribution from the settling defendants and plaintiff as they should have, *via* comparative liability. With justice done, nothing more was required with regard to the deck damages or McDermott's settlement with the sling defendants. The Fifth Circuit's decision took "well enough" and by not leaving it alone, produced utter injustice which, it is prayed, this Court should reverse.

The hook defendants are anticipated to argue, as did the Fifth Circuit panel opinion, that McDermott's settlement with the sling defendants must be confiscated and converted to the hook defendants' use to prevent McDermott's receiving a "windfall" or "double-recovery"; and that McDermott's acceptance of liability for the sling's failure should be disregarded. These arguments must lead this Honorable Court to disregard a great deal more to succeed.

In this case, as a matter of fact and as determined by the trial court, the settlement was no windfall or double recovery to McDermott. McDermott was denied recovery of damages to its Shearleg crane entirely as against the hook defendants, but such damages were plainly recoverable from the sling defendants and were slightly more than half the total dollar amount of McDermott's claims. Moreover, as the trial court also noted, there was no independent finding of liability against McDermott nor was Hudson Engineering, the McDermott subsidiary that designed the failed sling arrangement, held liable at all. See Petition Appendix pp. A-37 and 52. The clear import

of these aspects of the verdict is that, had the sling defendants gone to trial, McDermott could have been exonerated of all fault with regard to the sling failure and one or all of the sling defendants would have been found liable for both deck and crane damages. Hook defendants would remain liable for at least 70% of the damage to the SNAPPER deck section, but the sling defendants would have had no one to share liability for the crane damages with.[6] McDermott's proffered evidence of Shearleg crane damages well shows that, even if reduced to the same extent as were its deck claims[7], the $1 million settlement did not over-compensate McDermott in any regard.

ARGUMENT

A panel of the Court of Appeals for the Fifth Circuit took up for review a case adjudicated upon a jury verdict apportioning liability for $2.1 million in damage to McDermott's SNAPPER deck – 30% to the combined interests of McDermott, Inc., British Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V. (hereinafter collectively, McDermott/sling defendants) and 70% to AmClyde (32%) and River Don Castings, Ltd. (38%) (hereinafter collectively, hook defendants). Yet

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[6] This is true only *vis a vis* McDermott. *East River* would have imposed no blockade to proportionate contribution for all damages as between the hook and sling defendants, had they all gone to trial.

[7] The same percentage reduction yields $2,439,454.80 as an approximation of what plaintiff's crane damages award would have been.

remarkably, the Court of Appeals' panel opinion, without any finding of trial error in respect of damages or apportionment of causation between hook defendants[8] and "McDermott/sling defendants,"[9] and without examining the sling defendants' settlement terms, reversed and rendered its own judgment, redistributing liability for the damages – 78% to McDermott/Sling defendants and 22% to the 70% culpable hook defendants. In the process, the court below also took from McDermott 100% of the partial recovery it had made of its Shearleg crane damages *via* pre-trial settlement with the sling defendants. This incredible calculus was achieved by reducing McDermott's judgment against hook defendants by *both* the sling defendants' 30% proportionate liability *and* by a *pro tanto* credit for their entire settlement of deck, crane, and litigation liabilities with McDermott.

The court below based its raid against McDermott's judgment and settlement upon *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir. 1988), which, itself, is wholly based upon the Eleventh Circuit's interim version of a *pro tanto* "credit for settlement" rule enunciated in *Self v. Great Lakes Dredge & Dry Dock Co.*, 832 F.2d 1540

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[8] The Court of Appeals held that AmClyde was insulated from liability to McDermott, as a matter of law, by its contract with McDermott.

[9] " . . . the settling [sling] defendants, . . . where at the most thirty (30%) percent responsible for the accident (no separate contributory negligence, if any, finding was made as to McDermott). . . . " Trial Court Ruling on Motion for *Hernandez* Credit, Petition Appendix p. A-52.

(11th Cir. 1987), *cert. denied* 486 U.S. 1033 (1988).[10] Analysis of the legal underpinnings of *Hernandez* and *Self* reveals that the *pro tanto* credit for settlement should not, on its own principles, apply in the present case because the sling defendants' proportionate share of liability for the damages was properly determined and McDermott was not overcompensated in any way.

Moreover, the *pro tanto* rule is fundamentally unsound. Even in cases, like *Hernandez*, where a settling tort feasor's proportionate liability is not expressly tried, submitted to the fact-finder, and found, the *pro tanto* credit rule is unjustified and should be scrapped. This throw-back to "moiety"[11] or "no contribution"[12] rules, laid to rest by *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) and comparative apportionment of liability,[13] should likewise be committed to the deep.

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[10] *Self* was modified on subsequent appeal after remand, *Great Lakes Dredge & Dry Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 484 (1993), to open the door to unbridled contribution between settling and non-settling defendants.

[11] Aptly characterized by Judge Learned Hand as a "vestigial relic" of maritime law. *Oriental Trading & Transport Co. v. Gulf Oil Corp.*, 337 U.S. 919, 69 S.Ct. 1162, 93 L.Ed. 1728 (1949).

[12] Contribution, even by moiety, was disallowed at common law prior to the development of comparative negligence. cf. *The MAX MORRIS v. Curry*, 137 U.S. 1 (1890); *The ALABAMA & The GAMECOCK*, 92 U.S. 695 (1876).

[13] Owen & Moore, *Comparative Negligence in Maritime Personal Injury Cases*, 43 La.L.Rev. 941, 954 n.9 (1983).

I. THE *SELF\HERNANDEZ* "DOLLAR FOR DOLLAR SETTLEMENT CREDIT" IS NOT APPLICABLE

A. McDERMOTT RECEIVED NO WINDFALL OR DOUBLE RECOVERY

The trial court clearly held that *Hernandez* did not apply in this case because McDermott's inability to recover its Shearleg crane damages from anyone other than the sling defendants, whether by trial or settlement, prevented any violation of even *Hernandez*'s version of the "one satisfaction rule" (Petition Appendix pp. A-51-53). Moreover, in *Self* as in *Hernandez*, the dollar for dollar credit was an extraordinary remedy, applied to a perceived difficulty in accounting for an "absent" defendant's share of liability so that "present" or "non-settling" defendants would not be unjustly cast in judgment with a settling defendant's share of liability. The chorus to this chanty admonishes that the fault of a party not represented before the court cannot be tried. See, e.g., *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716, 718-720 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983). This "problem", while over-inflated in *Ebanks*, *Self*, and *Hernandez*, is left for later deflation herein, because it did not arise in the present case.

B. LIABILITIES, INCLUDING THAT OF SETTLING PARTIES, COMPARATIVELY APPORTIONED

McDermott, pursuant to its settlement, admitted and accepted liability for all damage caused by the sling defendants' involvement in this matter. The jury was

repeatedly so instructed. (JA pp. 26-28, 31-32, 38 and 40; Petition Appendix p. A-37). There was, therefore, no need for the jury or court to determine the sling defendants' subjective fault. Further, the apportionment of liability for damages was by the objective measure of causation, not fault, as the Fifth Circuit affirmed (Petition Appendix pp. A-31-32). Since no settling tort-feasor's state of mind or culpability was at issue, but only the physics of the objects involved, the presence or absence of a represented party behind any given object could have no proper impact upon apportionment of responsibility for the accident and damages.[14]

The *Hernandez* Court of Appeals was faced with a record apparently devoid of any effort to determine the settling defendants' proportionate share of liability. While the burden to establish a claim of right, like contribution, should rest with the party asserting it,[15] Dianella, the non-settling defendant in *Hernandez*, obtained a dollar for dollar contribution or credit for the settling defendants' $410,000.00 settlement with no proof of entitlement. The basis of the Court of Appeals' *Hernandez* decision, it is suggested, was more the sense of injustice engendered by the settling tort feasors' small settlement, Machiavellian involvement in the trial to Dianella's prejudice,[16] and the

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[14] Liability – in warranty, tort, or products liability – of course, had to be and was established as to the hook defendants. See, Petition Appendix pp. A-35-38.

[15] *Boyett v. Keene Corp.*, 815 F.Supp. at 209 and cases cited therein.

[16] "The third-party defendants settled with Hernandez . . . then participated in the trial to establish Dianella's negligence." *Hernandez*, 841 F.2d at 591.

resultant large judgment, rather than the opinion's two-paragraph kowtow to *Self* 's version of the "one satisfaction rule." *Hernandez* at 591. McDermott obtained no special favors from the sling defendants by the settlement. The jury was advised of the fact of the settlement, not amount, so that neither the sling defendants' absence as individual parties nor the potential interest or bias of any witness affiliated with the settling defendants would be a subject of speculation and no party would be prejudiced. Indeed, Herbert K. Alberts, a twenty year employee of Hendrik Veder, B.V., one of the settling sling defendants, testified as the hook defendants' expert on rigging, wire rope, and cable-laid slings. Trial Transcript Vols. 19-20, November 29, 1990, Doc. Nos. 346-347, R.O.A. Vols. 30-31.

On the contrary, in the present case, the mechanism and impact of the cable-laid slings' failure in the accident were fully litigated. The question whether failure of the hook or slings precipitated the accident was the very crux of the liability case at trial, as the hook defendants' counsel argued in closing (JA p. 35). The hook defendants' primary liability defense was that an "unwinding" phenomenon occurred in the slings due to inherent features of the slings' design and McDermott's arrangement of the slings in use, overloading and breaking the hook. McDermott's case posited that the hook broke first, due to manufacturing defects and misrepresentations about the hook's capacity, over-loading and failing the cable laid slings. McDermott also acknowledged that " . . . the failure of the slings at a load less than its rated minimum breaking strength is a cause of damage to the deck and crane . . . ", as the jury was repeatedly instructed at the

hook defendants' request.[17] Thus, unlike *Hernandez*, the extent of the settling sling defendants' involvement in causing the accident, as well as the plaintiff's part, was affirmatively litigated between McDermott and the hook defendants without collusion or realignment between plaintiff and the settling defendants.

Hook defendants, indeed all defendants, had answered McDermott's suit with, *inter alia*, boiler-plate defenses of plaintiff's contributory negligence and third party liability.[18] However, the hook defendants only cross-claimed against each other, counter-claimed against McDermott, Inc., and third party claimed against McDermott "sister" companies, e.g., Hudson Engineering, Inc. The hook defendants chose not to cross-claim against the sling defendants, perhaps to maintain solidarity among the defendants, while developing a defense almost entirely predicated on the theory that the failure of the sling caused the accident. The focus of the hook defendants' attack did not change after the sling defendants' settlement – at trial they still elected to defend in large part by seeking to attribute as much causation as they could to the sling failure, regardless of whether caused by

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[17] This is the only instruction sent into the jury room *via* Jury Interrogatory No. 5 (Petition Appendix p. A-37). This was at least the *sixth* reiteration of this stipulation or instruction. See, e.g, JA-28-29, JA-33, JA-34, JA-37-38, JA-39-40 and 42. It is submitted that the hook defendants, thusly, got as much mileage out of the settling defendants as they were entitled to and perhaps more.

[18] ISSI, Doc. No. 6, pp. 2214-15; British Ropes, Doc. 7, p. 2192; Clyde Iron, Doc. No. 10, p. 2181; River Don, Doc. No. 11, p. 2174; Hendrik Veder, Doc. No. 18, p. 2020.

McDermott's alleged misuse or the sling defendants' failure to warn.

Given the hook defendants' election to litigate on the basis of proportionate allocation of liability and the trial court's instructions to the jury thereon, hook defendants' invocation of the *Hernandez pro tanto* credit for settlement rule smacks of "double-dipping". The *Hernandez* or *Self* dollar for dollar rule, confected for cases in which the settling tort-feasors' proportionate liability cannot be or is not determined, cannot be justly applied in the present case, where the settling tort-feasors' share of responsibility could be and was candidly tried, found, and adjudged, 30% ($630,000.00) to the benefit of the hook defendants. See *Self*, at 1547. cf. *Edmonds*, 443 U.S. at 270-271, 99 S.Ct. at 2761-2762.

C. THE STATUTORY AND POLICY MANDATES ESSENTIAL TO THE REASONING OF *EDMONDS* AND *HERNANDEZ* ARE NOT PRESENT HERE

The present action is a property damage case; no injured longshoremen, seamen, nor any statutorily immune tort-feasors are involved. *Hernandez*, *Self* and their foundation, *Edmonds*, were longshoremen's cases involving *sui generis* concerns under the regime of immunities and liabilities mandated by the Longshoremen's and Harborworker's Compensation Act, 33 U.S.C. § 901 *et seq*. The rule of *Edmonds* and its erstwhile prodigies, *Self*, *Hernandez* and the decision below, loses its reason when the LHWCA's absolute liability for compensation benefits

and immunization from tort liability of plaintiff's stevedore employer are not present. The Eighth Circuit Court of Appeals so held, after searching analysis of law and policy on both sides of the question:

> "In *Edmonds*, the negligent party not present at trial (the longshoreman's employer) avoided tort liability by paying statutorily required benefits, rather than settling the longshoreman's claim. Thus, *Edmonds* does not involve the public policy considerations at issue in this case, such as the need to deter collusive settlements without deterring legitimate ones."

Associated Elec. Co-Op v. Mid America Transportation Co., 931 F.2d 1266, 1270-71 (8th Cir. 1991). *Edmonds*, itself, made this clear:

> "Though we recently acknowledged the sound arguments supporting division of damages between parties before the court on the basis of their comparative fault, see *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed. 251 (1975), [n.30] we are mindful that here we deal with an interface of statutory and judgemade law. In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change.

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 271-72, 99 S.Ct. 2753, 2762 (1979). The Court elaborated its intended distinction between LHWCA cases and other maritime cases in note 30:

> " . . . [T]he general rule is that a person whose negligence is a substantial factor in the plaintiff's indivisible injury is entirely liable even if

other factors concurred in causing the injury. Normally the chosen tortfeasor may seek contribution from another concurrent tortfeasor. If both are already before the court – for example, when the plaintiff himself is the concurrent tortfeasor or when the two tortfeasors are suing each other as in a collision case like *Reliable Transfer* – a separate contribution action is unnecessary, and damages are simply allocated accordingly. But the stevedore is not a party and cannot be made a party here, so the *Reliable Transfer* contribution shortcut is inapplicable. Contribution remedies the unjust enrichment of the concurrent tortfeasor, see Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U.Pa.L.Rev. 130, 136 (1932), and while it may sometimes limit the ultimate loss of the tortfeasors chosen by the plaintiff, it does not justify allocating more of the loss to the innocent employee [plaintiff], who was not unjustly enriched. . . . "

Id., at 271 n. 30.

McDermott, like virtually all settling plaintiffs, as part of the consideration for its settlement with the sling defendants was obligated to defend, indemnify and hold them harmless against any claim for contribution (Petition Appendix, pp. A-62-63). Thus, whether assumed voluntarily, as at the trial below, or compelled in a separate contribution action, McDermott would ultimately bear the sling defendants' proportionate share of liability. The "*Reliable Transfer* contribution shortcut" *was applicable* in this case and was properly and efficiently executed by the parties and the court at trial. The Court of Appeals' award to the hook defendants of a second round of contribution – dollar-for-dollar, rather than proportionate

– directly produced the "unjust enrichment of the concurrent tortfeasor" and "allocated more of the loss to the innocent" plaintiff, which this Court identified as the very evils to be remedied by proportionate contribution and joint and several liability among co-tortfeasors. *Edmonds*, at 271 n. 30. *Hernandez*'s interpretation of *Edmonds*' rule, therefore, is not applicable to this case, and moreso, it should clearly not be applied as an *additional* reduction in the injured plaintiff's recovery.[19] Indeed, if the rule of *Edmonds* is strictly applied in this case, accepting *arguendo* the analogy, necessary to *Self*, between the stevedore's payment of compensation and payments received in settlement, exactly the opposite result obtains – McDermott suffers no reduction in its recovery against the hook defendants; neither proportionate to the sling defendants' liability, nor dollar for dollar.

II. THE *PRO TANTO* CREDIT FOR SETTLEMENT RULE IS SIMPLY A BAD IDEA

A. NOT DOLLAR FOR DOLLAR BUT APPLES FOR ORANGES

The foregoing analysis of the "*pro tanto* credit for settlement rule" applied to the case subjudice, amply demonstrates the fundamental flaws in this seductive but

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[19] In *Edmonds*, the Court required trial defendants to pay 100% of the plaintiff's damages *regardless* of the stevedore's comparative liability or benefits paid. Clearly, *Edmonds*' affirmation of joint and several liability sinks, rather than supports *Self*, *Hernandez*, and the opinion below.

unjust regime. Foremost among these is the impossible equation of settlement dollars with judgment dollars in computation of "one satisfaction". As the Fifth Circuit said in *Leger v. Drilling Well Control*, 592 F.2d 1246, 1250 (5th Cir. 1979):

> "Leger merely obtained a favorable settlement. By releasing DWC and Continental in exchange for $182,331.05, Leger 'sold' or relinquished any claims which he had against them. See *Rose v. Associated Anesthesiologists*, 163 U.S.App. D.C. 246, 501 F.2d 806 (1974) (characterizing a settlement as a *pro rata* sale of the plaintiff's claim). At the time of the settlement negotiations, no one knew how a jury would apportion fault or in what amount it would find damages."

Furthermore,

> " . . . [S]ettlement Dollars cannot be equated with dollars obtained in the trial process. Any amounts received in settlement are discounted both by plaintiff and defendant to take into account the risks and rewards of going to trial. . . .
>
> "It is clear that the condition *vel non* of double recovery depends upon whether one totals the absolute dollar figures of recovery and matches the total against the total damages [found at trial] or whether one totals the percentages of fault and sees that the total does not exceed [or fall short of] 100%."

Id., at 1250 n. 10. Accord, *Associated Elec. Co-Op v. Mid America Transportation Co.*, 931 F.2d at 1271.

Parties buy peace, avoid litigation burdens and expenses, avoid actual proof of and findings of liability,

avoid publicity and resolve the risks of trial, all by offer and acceptance of a mutually agreeable, determinate sum. Judgment dollars, on the other hand, carry with them all of the above-mentioned transaction costs, notably here, the costs of delay and litigation even after judgment. In *Franklin v. Kay Pro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, 11 S.Ct. 232 (1993), the court noted:

> " . . . [T]he very dynamics of settlement guarantee that, even with a good faith hearing, the offset scheme forces non-settling defendants to pay more than the amount for which they are culpable. Settlement is attractive to parties because it reduces litigation costs. Therefore, plaintiffs are willing to settle for less than they might receive, if a claim were fully litigated [note 16 quoted below, citation omitted]. Courts are instructed to allow this discounting when determining whether a partial settlement was entered in good faith. . . . [citations omitted]"
>
> "[note 16] . . . 'Settlements are desirable not just because trials are costly . . . but because settlements allow parties to "manage their own disputes" and avoid the uncertainties and limitations of the winner-take-all, imposed decisions that courts make in fully litigated cases. Settlement also offers privacy to litigants and enables them to consider opportunities for resolutions that would not be available in a trial judgment.' D. Provine, *Settlement Strategies for Federal District Judges*, 1-2 (1986)."

McDermott's settlement with the sling defendants in the present case demonstrates several of these factors, including the substantial trial-cost savings to the court and parties of removing three defendants and "netting out"

the costly and complex conflict between McDermott's potential contributory liability for misuse of the cable laid slings *versus* the sling defendants' failure to warn of or to remedy the dangers inherent in cable laid slings with opposite "lay" directions, by simply assuming full responsibility for the proportion of damage to the SNAPPER deck caused by the slings' failure at trial. Though much to McDermott's chagrin, the settlement also avoided trial of McDermott's Shearleg crane damages and provided the only recovery McDermott would receive for that entire class of damages, since the sling defendants turned out to be the only parties chargeable with such damages.

The *pro tanto* conversion of settlements from the plaintiff's benefit to a non-settling defendant's wholly destroys the consideration for the above-described settlement bargain. Plaintiffs' counsel, knowing they can gain nothing more than the judgment by settling, could not advise their clients to proceed other than to trial against all potential defendants, on all potential claims. This is particularly true where, as in the present case, the non-settling defendants continue to deny liability by pointing to others, i.e., the settling defendants. It is either disingenuous or naive to suggest, as some proponents of the *pro tanto* credit for settlement rule have, that plaintiffs or courts are somehow relieved of concern for the third party liability defense or that defendants will not use this diversionary strategy to minimize their liability, if a dollar for dollar credit for settlement is given.[20]

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[20] "The extent of wrong doing of the settling defendants in relation to the [non-settling defendants] is either highly relevant (under the 'proportionate' rule) . . . or not important at all (under the '*pro tanto*' rule)." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 161 (4th Cir. 1991); discussed in D. Hansen, "The Effect of Partial Settlements on the Rights of Non-Settling Defendants in Federal Securities Class Actions: In Search of a Standardized Uniform Contribution Bar Rule," 60 U.M.K.C.L.Rev. 91, 107 (1991).

> "Under either [proportionate or *pro tanto*] rule, the non-settling defendants have every incentive to minimize their liability by arguing at trial that the settling defendants were at fault."

In re Sunrise Sec. Litig., 698 F.Supp. 1256, 1260 (E.D.Pa. 1988). So long as defendants retain the right to urge the defense of third party liability at trial, dollar for dollar credit for an already discounted settlement will always tend to compound the reduction in plaintiff's recovery.

B. *PRO TANTO* SETTLEMENT CREDIT DISCOURAGES GOOD FAITH SETTLEMENT

Plaintiffs subjected to the *pro tanto* scheme, as noted above, lose the economic incentive to settle, because they do not get to keep the money after trial and they know they will still have the same defenses to overcome in order to obtain a judgment. Defendants, particularly the most culpable ones, have little motivation to settle, either. The most culpable defendants gain the most by putting as much pressure on their co-defendants to settle for as much as possible with the plaintiff. This is true, because minimally liable defendants would contribute little by proportionate apportionment anyway, while the mostly culpable defendant already expects to bear the brunt of

plaintiff's recovery; thus, intransigence by the worst defendants is favored by the *pro tanto* credit. The alternative for the mostly liable defendant is to try to conceal its liability and settle quickly and cheaply, before discovery is complete, thus passing its liability on to any minimally liable, solvent party. Proponents of the *pro tanto* approach have suggested that defendants who genuinely believe themselves to be free from liability are most likely to go to trial and most deserving of their day in court. Yet, as noted above, the *pro tanto* regime provides every incentive for the opposite result. *Holding the Bag – Proportional Fault and the Non-Settling Defendant: Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1988 A.M.C. 2278 (11th Cir. 1987), cert. denied, 108 S.Ct. 2017, 1988 A.M.C. 2407 (1988)*, 14 Tul.Mar.L.J. 415, 422 (1990).

Pro tanto credit for settlement also discourages settlement by removing the incentive of minimizing or curtailing litigation. Equity, deterrence and *Reliable Transfer* require that responsibility for damages be spread by proportionate liability. Accord, *Great Lakes Dredge & Dry Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir. 1992). Either substantial litigation must be undertaken to assess the "good faith" or fairness of the settlement amount for the non-settling defendants so that a "contribution bar" can be ordered or contribution rights must be kept open and litigated.

The litigation history of *Great Lakes Dredge & Dry Dock Co. v. Tanker Robert Watt Miller, id.* exemplifies why virtually every court that has applied a "*pro tanto* credit for settlement" rule has undertaken the necessary determination of the settlement's fairness and good faith as foundation for a "settlement bar" to contribution. The

collision in that case occurred February 5, 1975. Chevron settled all ten of the personal injury and death claims against it by May 29, 1979. Trial of the plaintiffs' cases against *Great Lakes* began June 1, 1979. Chevron was found 100% at fault and *Great Lakes* was exonerated. The seamen plaintiffs appealed, obtaining reversal and remand. *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982). The case was tried again, January 28, 1985, resulting in a finding of 70% liability against Chevron, 30% against *Great Lakes*.[21] All three parties appealed, *inter alia*, the trial court's proportionate reduction of Self's recovery by Chevron's *pro rata* share of liability. In *Self v. Great Lakes Dredge & Dock Co., supra*, the court affirmed in part, reversed in part and remanded for a new trial on damages and for application of a *pro tanto* credit and joint and several liability between Chevron and Great Lakes. Great Lakes settled before trial with Self and urged claims for contribution which the trial court denied. On April 16, 1992, the Eleventh Circuit again reversed and remanded for trial of Great Lakes contribution claims. *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir. 1992), *cert. denied* 113 S.Ct. 484 (1993). Eighteen years post-accident, fourteen years after the first trial, and three appeals later, the case is still not resolved.[22]

Since the Fifth Circuit gave no consideration to any "fairness" evaluation of the settlement in the present

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[21] *Great Lakes* had, by this time, settled all the seaman's claims except those for the death of Danny Self.

[22] Punitive damage claims urged and settled against *Great Lakes*, among other issues, provide the complex fodder for more litigation.

case, nor in any of its other *Self/Hernandez*-based decisions, it can only be presumed that it is headed down the same Hobbesian "slippery slope" to confusing and protracted litigation that the Eleventh Circuit plunged down in the *Great Lakes Dredge* litigation. Balanced against such anarchy, the "fairness" or "good faith" hearings required for application of a contribution bar under regimes following the Uniform Contribution Among Tortfeasors Act § 1, 12 U.L.A. 63 (1975)[23] seems a great improvement. However, a thorough evaluation of the "fairness" hearing process shows that it, too, is merely an awkward, problematic, and unnecessary appendage to the maritime law of comparative liability.

The mere listing of factors considered by courts in evaluating the fairness of settlements demonstrates the inefficiency and cost attendant to the *pro tanto* credit for settlement rule:

1. The lack of collusion;
2. Relation of settlement amount to potential success on liability and damages at trial;
3. Defendants' ability to pay;
4. The amount and nature of discovery and evidence;
5. The stage of the proceedings;
6. Potential expense and duration of litigation;

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[23] "The requirement that the release or covenant be given in good faith gives the court occasion to determine whether the transaction was collusive, and if so there is no discharge." Uniform Contribution Among Tortfeasors Act § 4, 12 U.L.A. 98, 99 (1975) (commissioners' comment).

7. Recommendations of experienced counsel;
8. Plaintiff's need for immediate relief; and
9. The number and nature of objections.

Kirkorian v. Borelli, 695 F.Supp. 446, 450 (N.D. Cal. 1988). When "good faith" is also evaluated, in addition to the foregoing, courts consider (1) the possible uncollectibility of a larger judgment against settling defendants; (2) the adequacy of settlement in light of uncertainties surrounding the settling defendants' liability; (3) adequacy of the settlement amount in light of comparative culpability of the defendants; and (4) participation of a magistrate or judge in settlement negotiations. *Id.* at 453. Still more factors have been identified for evaluation of a settlement's propriety. These include (1) the extent of documentary evidence in the case (since early settlement would precede deposition and trial testimony), (2) the fact finder's likely grasp of liability and damage theories and evidence, (3) the experience and personality of the judge, (4) the skill and experience of opposing counsel. D. Gold, *Partial Settlements in Securities Actions with Private Parties and the Securities and Exchange Commission*, 443 Practising Law Institute, Litigation and Administration Practice Course Handbook Series 695 (September-October 1992). The parties and court might as well try the entire case. The most notable and probable limitation on these fairness hearings is the parties' unwillingness to disclose strengths, weaknesses, and strategies of their cases in full view of non-settling defendants. The obvious result is that the "fairness" or "good faith" hearing is conducted with such reticence that it is useless, or the intransigent defendant is provided not only dollar for dollar contribution from settling parties, regardless of liability, but also a

preview (with each settlement) of the plaintiff's case, so that it can further minimize its exposure – all this, and the case is still to be tried.

Both "fairness hearings" and open contribution involve substantial litigation and cost ancillary to the main case, yet there is no reason to believe either can produce better results than the settling parties' consideration of their own strengths and weaknesses in reaching reasonable settlements, enforced by one trial of the matter that apportions comparative liability once and for all.[24]

III. THE PROPORTIONATE, MODERN *PRO RATA*, EQUITABLE CREDIT OR *LEGER* APPROACH – BY ANY OTHER NAME WOULD SMELL AS SWEET

A. THERE IS NO CONFLICT WITH *EDMONDS*

Self's rejection of *Leger* appears based upon a misperception that *Leger* abrogated joint and several liability among co-tortfeasors. Nothing in *Leger* requires such a result. *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421 (5th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, Nos. 1911251 and

[24] This is also true *vis a vis* the "one satisfaction rule." As the Pennsylvania Supreme Court reasoned in adopting a proportionate regime, " . . . 'there [is no] reason to suppose that the jury's evaluation of losses is more accurate than the evaluation made by the parties to the settlement. Surely where liability is contested, the verdict many not reflect the exact worth of the injuries.' " *Charles v. Giant Eagle Markets*, 513 Pa. 474, 478-79, 522 A.2d 1, 3 (1987), quoting *Theobald v. Angelos*, 44 N.J. 228, 239-40, 208 A.2d 129, 135 (1965).

1911252, slip opinion p. 10, 61 U.S.L.W 2745, 1993 W.L. 154448 (Ala. May 14, 1993). The non-settling tortfeasors remain jointly liable for the proportionate share of plaintiff's damage, not released by settlement with other defendants. As discussed above, *Edmonds'* statutorily immunized stevedore is otherwise simply not comparable to a defendant whose proportionate share of liability is voluntarily released by settlement.

B. PROPORTIONATE CREDIT FOR SETTLEMENT IS EFFICIENT, EFFECTIVE, AND FAIR

The *Leger* proportionate liability rule is most efficient because it resolves the entire case in one trial as *Reliable Transfer* suggested. T. Schoenbaum, *Admiralty and Maritime Law*, 1992 Supplement, § 4-15, p. 26 (West 1987). There is no need for contribution litigation, unless non-settling parties do not pay their apportioned shares. The amount of a contribution debtor's liability has already been conclusively determined; all that remains is for co-defendant creditors to execute thereon. The separate "fairness trial" required under a *pro tanto* credit rule that bars contribution is rendered superfluous.

Since all liabilities are to be apportioned in one trial, including the liability of settling parties, all have the same motivation to carefully assess their potential rights and liabilities and to approximate them in settlement. Collusion or irresponsibly low settlements should be well dissuaded by the knowledge that non-settling defendants will nonetheless only pay their proportionate share of liability in damages. Plaintiff stands to gain nothing by collusion with a settling defendant beyond what good

trial preparation would provide. If a plaintiff is willing to trade off settlement dollars against his own litigation expenses, e.g., by obtaining a settling defendants' cooperation in producing witnesses, he should have the benefit and risk of that tactic.[25] Informing the jury of the fact of the settlement, as McDermott candidly did in the present matter, prevents the possibility of any prejudice from jury speculation about the absent defendant.

Most notably, the *Leger* rule is fair. Liability is equitably distributed among the parties in proportion to their fault and causation of damages. More culpable tortfeasors bear greater liability and less blameworthy ones bear less, regardless of the settling parties' bargains. Thus, the rule of *Reliable Transfer* and its underlying policy – deterrence of unsafe behaviors by placement of liability upon the parties responsible for accidents in accord with their comparative contribution – is furthered.

> "One of the principle virtues of the 'proportionate' method lies in its promotion of the policy objectives served by the contribution right which it replaces: *fairness* (by apportioning liability according to fault), and *deterrence* (by insuring that the most culpable parties bear the consequences of their actions). It is the only set off, as the Ninth Circuit recognized, which satisfies 'the statutory goal of punishing each wrongdoer, the equitable goal of limiting liability to relative culpability, and the policy goal of

[25] Fed.R.Evid. 403 permits the opposing parties' revelation of the settlement in cross examination of witnesses affiliated with settling parties if it is germane to interest or bias.

> encouraging settlement.' *Franklin v. Kay Pro Corp.*, 844 F.2d at 1231."

U.S.F. & G. v. Patriot's Point Development Authority, 772 F.Supp. 1565, 1573 (D.S.C. 1991). At the same time, and with no diminution in deterrence, the " . . . aleatory nature of the settlement process . . . " is respected[26] and plaintiff receives but one satisfaction, either agreed in settlement or adjudged at trial, for each defendant's proportionate share of liability. As one learned commentator recently noted:

> "On balance, about all one gets from *Self* [*pro tanto* settlement set-off] with a settlement bar to contribution is certainty. The Supreme Court held in *Reliable Transfer* that certainty which was unfair could no longer be approved in maritime law."

W. Daly, *Contribution and Indemnity*, paper delivered at the Tulane University School of Law Admiralty Law Institute, March 17-19, 1993 (to be published in the Tulane Maritime Law Journal).

CONCLUSION

The injustice of the Fifth Circuit's credit to trial defendants of the settling defendants' *pro rata* share of liability *and pro tanto* credit for the settlement amount is clear. The questions presented for decision in this case by the parties, *amici curiae*, and the conflicting rules of the

[26] *Doyle v. United States*, 441 F.Supp. 701, 711 n.5 (D.S.C. 1977).

lower courts are whether and from whom a non-settling defendant can obtain some sort of credit for other defendants' settlements with plaintiffs, while still honoring the plaintiffs' release of settling defendants from liability for contribution. McDermott, as petitioner herein, submits that there is no legal basis nor is there any need to grant trial defendants dollar for dollar credit for a settlement to which they are not a party. Settlements are and should be extra-judicial, contractual resolutions of disputes. If a trial defendant or plaintiff wishes, for any reason, to have his liability affected by liability attributable to settling parties, he must undertake a trial strategy to present such a case to the fact finder; and any opposing parties must make their cases accordingly. This regime already obtains as the ubiquitous "third party liability" defense shows. It requires no ancillary litigation over the settlement, while economically coercing parties to make genuine good faith efforts to settle for amounts commensurate with potential liability. Litigation costs are, thereby, no more than what is required to try the matter between the parties who cannot settle. All the attendant costs, burdens, risks, and benefits rest with the parties to each decision, counselling fairness and responsibility at every stage of litigation.

Wherefore, McDermott, Inc. prays that this Honorable Court reverse the decision of the United States Court of Appeals for the Fifth Circuit, herein, and reinstate the judgment of the trial court, denying the non-settling hook

defendants dollar for dollar credit for the sling defendants' settlement.

Respectfully submitted,

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No. 92-1479

In The

Supreme Court of the United States

October Term, 1993

McDermott, Inc.,

Petitioner,

vs.

AmClyde, A Division of AMCA INTERNATIONAL, INC. and RIVER DON CASTINGS, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S ORIGINAL BRIEF ON THE MERITS

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QUESTION PRESENTED

Should this Court adopt a rule for maritime tort actions which permits a plaintiff who settles with some, but not all, defendants prior to judgment to receive more in satisfaction of his judgment against the non-settling defendant than the amount awarded by the jury; *or* should the Court adopt a rule which credits the non-settling defendant for the dollar amount of all previous settlements to insure the plaintiff only one satisfaction?

LIST OF PARTIES

Parties to the proceedings below were petitioner, McDermott, Inc., respondent, River Don Castings, Ltd., defendant AmClyde, a Division of AMCA International, Inc. (formerly "Clyde Iron"), and settling defendants British Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V.

RULE 29.1 LIST

The parent corporation of River Don Castings, Ltd. is Sheffield Steel, Ltd., a corporation of the United Kingdom.

There are no subsidiary companies.

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RESPONDENT'S ORIGINAL BRIEF ON THE MERITS

STATEMENT OF THE CASE

Petitioner instituted this civil action against AmClyde, the designer and manufacturer of a 5,000 ton "Shearleg" crane; River Don, the subcontractor that manufactured the crane's hook; British Ropes and Hendrick Veder, manufacturers of the slings utilized in the lift; and International Southwest Slings, Inc., ("ISSI"), the supplier of the British Ropes sling, seeking recovery for damages to the crane and an oil and gas production platform (hereinafter "Snapper deck").

The basic facts leading up to the accident are undisputed. Petitioner purchased the 5,000 ton Shearleg crane for use in its marine construction business. After conducting several test lifts, McDermott loaded the crane onto a barge in order to utilize it offshore. On October 10, 1986, petitioner attempted to utilize the Shearleg crane to lift the Snapper deck and attach it to a structural steel base which had previously been set in the Gulf of Mexico off the coast of Texas. As the crane lifted the deck, one of the prongs of the crane's hook broke, and one of the slings that connected the deck to the hook unraveled at its "eye splice," causing the Snapper deck to drop back onto its transport barge and striking the boom of the Shearleg crane. Both the deck and the crane were damaged as a result of this incident.

After the accident, McDermott repaired the Snapper deck and the Shearleg crane. On October 13, 1986, McDermott made a call in warranty against AmClyde. A provision of the sales contract between McDermott and AmClyde set forth that McDermott's only remedy was the repair or replacement of parts found to be defective in material or workmanship. While contesting whether the hook was defective, AmClyde nonetheless provided a replacement hook.

On the morning of trial, McDermott announced to the court that it had reached a settlement of McDermott's claims against the manufacturers and supplier of the slings, the so-called "sling defendants." Counsel for petitioner announced the terms of the settlement as follows. " . . . McDermott will dismiss all claims with prejudice against the three sling defendants in exchange for the payment of $1,000,000. . . . " (J.A., p. 24.)

Thereafter, for tactical reasons, counsel for petitioner advised the court that McDermott would accept responsibility for any part the slings played in causing the accident. (J.A., pp. 25, 29.) Continuing with this tactical approach, counsel for McDermott told the jury in opening statement that McDermott would have to bear the responsibility for any part that the jury found the slings played in the casualty. (J.A., pp. 26, 27.)

Shortly after the settlement was announced, counsel for respondent advised the court that it would seek a dollar-for-dollar credit for the settlement made by the sling defendants pursuant to the existing precedent of the United States Fifth Circuit Court of Appeals in *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir.), *modified on other grounds*, 848 F.2d 498, *cert denied*, 488 U.S. 981, 109 S.Ct. 530, 102 L.Ed.2d 562 (1988).

Throughout the trial, respondent contended that the accident occurred solely as a result of the negligence of petitioner. Indeed, a review of the pre trial contentions of respondent in the pre trial order, (R. 285), and the opening statement and closing argument of counsel for respondent reveals that at no time did respondent contend that the sling defendants' negligence was a cause in fact of the accident. (J.A., pp. 34-36, R. 273, pp. 2855 *et seq.*) Most importantly, the jury was charged that the respondent and AmClyde contended only that *petitioner* was negligent in misusing the cable laid slings and overloading the hook. (J.A., p. 37.) No jury charge was given regarding the settling defendants' fault and no evidence of the sling defendants' negligence was ever offered by counsel for respondent at trial. Rather, counsel for

respondent repeatedly requested a dollar-for-dollar credit for the amount of the settlement of the sling defendants.

The jury returned a verdict finding AmClyde 32% at fault, River Don 38% at fault, and "McDermott/sling defendants" 30% at fault. The jury found McDermott's damages to be $2,100,000 and declined to award pre-judgment interest. Though the jury verdict form read "McDermott/sling defendants,"[1] the 30% assigned in that space could only have been for petitioner's negligence, because the only evidence presented to the jury by respondent was the fault of McDermott, and the jury was not charged to consider the sling defendants' fault.

Thereafter, the trial court reduced the judgment by McDermott's 30% fault for misusing the right hand and left hand cable laid slings, resulting in the recoverable amount for petitioner of $1,470,000. The trial court initially withheld entering judgment to consider respondent's request for a dollar-for-dollar credit for petitioner's settlement with the sling defendants. Thereafter, the trial court entered judgment denying respondent's motion for a dollar-for-dollar credit, dividing damages in accordance with the jury's allocation of liability: $672,000 against AmClyde and $798,000 against River Don. After final judgment was entered, all parties filed timely notices of appeal to the United States Fifth Circuit Court of Appeals.

[1] McDermott did not object to the trial court's verdict form.

On appeal, the Fifth Circuit upheld the allocation of 30% negligence to McDermott.[2] The Court also found that the remedies contained in the contract between AmClyde and McDermott were valid and enforceable, and reversed the judgment against AmClyde. The Fifth Circuit also affirmed the trial court's finding of 38% fault on River Don and granted respondent's request for a dollar-for-dollar credit for the dollar amount McDermott had received from the sling defendants. Accordingly, judgment was entered against River Don for $470,000, the full amount remaining to be paid to fully satisfy McDermott's judgment for its damages.

McDermott's Petition for Rehearing and Rehearing *En Banc* were denied by the United States Fifth Circuit Court of Appeals. Petitioner then petitioned this Court to review the Fifth Circuit's ruling on several issues. On June 28, 1993, this Court granted a Writ of Certiorari limited to the question of whether the United States Fifth Circuit Court of Appeals correctly applied a dollar-for-dollar credit in entering judgment against respondent.

SUMMARY OF THE ARGUMENT

A. Neither the *pro rata* nor the *pro tanto* method of crediting a non-settling defendant for a previous settlement is without flaw. When a plaintiff settles with one of several defendants, the non-settling defendant is entitled to a credit for that settlement, because plaintiff has been

[2] This finding has not been appealed to this Court by petitioner.

partially compensated for his damages. Respondent suggests that the dollar-for-dollar or *pro tanto* credit method adopted by the Fifth and Eleventh Circuits is the preferable method, because a plaintiff receives in satisfaction of his judgment no more and no less than the amount determined by the trier of fact to be his damages.

While principles of joint liability insure that a plaintiff recovers the full amount of his damages, the logical and widely accepted corollary is that a plaintiff is only entitled to one satisfaction of his damages. Any rule of law which allows a plaintiff to recover more than his just compensation is contrary to justice and undermines the purpose of an action in tort. To allow a plaintiff to profit from litigation, such as would occur under petitioner's proposed method of reduction for the sling defendants' settlement, is repugnant to fundamental fairness and promotes vexatious litigation rather than judicial economy.

The *pro tanto* method of reduction is the most universally accepted method of crediting a defendant for another defendant's settlement. Thirty-four of the fifty states of the United States provide for the reduction of a plaintiff's award by the dollar amount of any settlement with a joint tort-feasor. The courts of the United Kingdom also follow the *pro tanto* method of reduction when settlements with less than all joint tort-feasors are involved. The principle underlying the rule is the same as in the courts of the United States: "in every tort, there is only one damage."

One of the fundamental differences between the *pro tanto* and *pro rata* methods is in the allocation of the risk of an insufficient settlement. By placing the risk of an

insufficient settlement on the tort-feasor and insuring that a plaintiff receives full recovery of his judicially determined damages, the *pro tanto* method encourages settlement.

Under the *pro rata* method, a settling plaintiff faces two critical uncertainties which create a disincentive to settlement. First, settlement with one defendant could leave him unable to collect the balance of the total assessed damages from the remaining defendants. Second, the full effect of settlement cannot be known until the trier of fact determines the settling party's relative fault. Moreover, under the *pro rata* method, after a settlement with one defendant, the posture of the case changes dramatically, often on the eve of trial. Because of the settlement, the non-settling defendant is in the position of having to bear the burden of proving the fault of the settling defendant. The plaintiff is put in the awkward position of having to defend the actions of a party he once blamed, the now unrepresented settling defendant. The trial is thus prolonged and complicated by litigating the fault of the absent, unrepresented party.

The alleged opportunity for collusion under the *pro tanto* method referred to by petitioners and Amici is alleviated by the requirement that any settlement agreement be made in good faith. Good faith inquiries can be and have been conducted quite expeditiously. A full evidentiary hearing or "mini-trial" regarding the good faith of a settlement is not a necessary corollary to the *pro tanto* method.

B. Respondent suggests that many of the difficulties presented by both approaches could be obviated by this

Court fashioning a rule to be applied in maritime tort cases whereby the non-settling defendant has the option to choose the method of reduction. Under respondent's alternative proposal, a non-settling defendant would designate either the *pro rata* or the *pro tanto* method of reduction for any previous settlements by plaintiff. Allowing the non-settling defendant to choose the credit method is justified, because he is not a party to the settlement, and it should not operate to his detriment. Moreover, because the settling parties would not know which method will be chosen, collusion between the settling parties would be discouraged.

ARGUMENT

I. WHEN THE PLAINTIFF IN A MARITIME TORT ACTION SETTLES WITH SOME, BUT NOT ALL, DEFENDANTS PRIOR TO JUDGMENT, HIS AWARD AGAINST THE NON-SETTLING DEFENDANT SHOULD BE REDUCED *PRO TANTO* SO THAT HE RECEIVES FULL SATISFACTION OF HIS JUDICIALLY DETERMINED DAMAGES.

Neither the *pro rata* nor the *pro tanto* method of crediting a non-settling defendant for a previous settlement is without flaw.[3] The American Law Institute has refused to recommend one approach over the other.[4]

[3] *See* Restatement (Second) of Torts §886A (1977), Contribution Among Tort-feasors, comment m (1965) ("Each [method] has its drawbacks and no one is satisfactory.")

[4] Restatement (Second) of Torts §886A (1977), comment m(3) states: "The institute leaves these issues to a caveat and takes no position."

All parties and Amici agree that when a plaintiff settles with one of several defendants, the non-settling defendant is entitled to a credit for that settlement, because plaintiff has been partially compensated for his damages. Petitioner and Amici suggest that this Court adopt the *pro rata* or proportional fault credit method under which a plaintiff may receive in satisfaction substantially more (or less) than the jury's award. Respondent suggests that the dollar-for-dollar or *pro tanto* credit method adopted by the Fifth and Eleventh Circuits is the preferable method, because a plaintiff receives in satisfaction of his judgment no more and no less than the amount determined by the trier of fact to be his damages.

A. Petitioner Is Entitled To Only One Satisfaction Of Its Damages

Long before this Court's adoption of comparative fault in maritime collision cases in *United States v. Reliable Transfer*, 421 U.S. 397, 95 S.Ct. 708, 44 L.Ed.2d 251 (1975), the general maritime law recognized the concept of joint liability. In *The Atlas*, 93 U.S. 302, 23 L.Ed. 863 (1876), this Court held that the insurer of cargo lost in a collision between two vessels caused by the fault of both could recover all of its damages from one vessel. The court looked to the common law in recognizing a plaintiff's right "to sue . . . all the wrongdoers or any one of them at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss." *The Atlas*, 93 U.S. 302, 23 L.Ed. 863 (1876); *see also The Alabama*, 92 U.S. 695, 23 L.Ed. 763 (1876).

While principles of joint liability insure that a plaintiff recovers the full amount of his damages, the logical and widely accepted corollary is that a plaintiff is only entitled to one satisfaction of his damages.[5] A plaintiff should not receive, for the same wrong, remuneration in excess of his actual damages.

In civil actions, this fundamental principle is one of just compensation for the loss sustained so that the injured party may be made whole or restored as nearly as possible to the position he was in prior to the injury. 25 C.J.S. Damages §3 (1966), p. 626. However, the person who has sustained loss is not entitled to be made more than whole, recover an amount in excess of the damages

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[5] Harris, *Washington's Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and the Reasonableness Hearing Requirement*, 20 Gonz. L. Rev. 69, 84, n.46 (1984-85); *Kassman v. American Univ.*, 546 F.2d 1029, 1033 (D.C. Cir. 1976) ("cardinal principle of law" that claimant can recover no more than loss actually suffered); *Rose v. Associated Anesthesiologists*, 501 F.2d 806, 809 (D.C. Cir. 1974) (one satisfaction rule is "equitable in its nature, and its purpose is to prevent unjust enrichment"); *Screen Gems-Columbia Music, Inc. v. Matlis & Lebow Corp.*, 453 F.2d 552, 554 (2d Cir. 1972) ("under elementary principles of tort law a plaintiff is entitled to only one recovery for a wrong"); *Layne v. United States*, 460 F.2d 409, 411 (9th Cir. 1972) ("sound public policy of permitting a plaintiff to receive only the amount of his adjudged damages and no more"); *Carr v. Cove*, 33 Cal. App. 3d 851, 854, 109 Cal. Rptr. 449, 451 (1973) ("general theory of compensatory damages bars double recovery for the same wrong"); *American Home Assurance Co. v. Vaughn*, 21 Ariz. App. 190, 517 P.2d 1083, 1085-86 (1974) ("Once a party is made whole, the "law has served its purpose"); *Popovich v. Ram Pipe & Supply Co. Inc.*, 82 Ill. 2d 203, 412 N.E.2d 518, 521 (1980) (condemning double recovery); *Consolidated Rail Corp. v. Travelers Ins. Co.*, 466 N.E.2d 709, 712 (Ind. 1984) ("Elementary principle of tort law").

sustained, make a profit, or be put in a better condition than he would be had the wrong not occurred. *Id.* at 627-28, 22 Am. Jur. 2d Damages §27 (1988), pp. 54-56. Stated differently, the purpose of allowing an action in tort is to afford compensation, rather than enrichment. *Atlantic Coast Line R. Co. v. Ouzts*, 82 Ga. App. 36, 60 S.E. 2d 770 (1950); *see also Donaldson v. Carmichael*, 102 Ga. 40, 29 S.E. 135 (1897).[6]

Any rule of law which allows a plaintiff to recover more than his just compensation is contrary to justice and undermines the purpose of an action in tort. To allow a plaintiff to profit from litigation, such as would occur under McDermott's proposed method of reduction for the sling defendants' settlement, is repugnant to fundamental fairness and promotes vexatious litigation rather than judicial economy.

Only the *pro tanto* method of credit insures adherence to the one satisfaction rule. Prior to *Reliable Transfer*, courts followed a rule in which damages cast against a tort-feasor would be reduced by the amount paid in settlement by other joint tort-feasors. In *Billiot v. Seawart Seacraft, Inc.*, 382 F.2d 662, 664 (5th Cir. 1967), the United States Fifth Circuit adopted the dollar-for-dollar credit for

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[6] "The universal and cardinal principal is that the person injured shall receive a compensation commensurate with his loss or injury, and no more. 1 Suth. Dam. p. 27. . . . The plaintiff is entitled to only one satisfaction, and, if the manner of releasing one involves satisfaction in whole or in part of the claim, it will inure to the discharge pro tanto of all who are liable. *Lord v. Tiffany*, 98 N.Y. 412 [1885]; *Kasson v. People*, 44 Barb. 347 [N.Y. 1864]; *Ellis v. [Essau]*, 50 Wis. 138, 6 N.W. 518 [1880]." *Donaldson*, 29 S.E. at 136-137.

cases where a plaintiff settles with one defendant and subsequently litigates his damages against another defendant. The Fifth Circuit set forth the policy reasons behind this rule by stating, "A double recovery may be prevented by deducting the amount of the settlement payment from the total damages. Judgment may then be awarded to appellant for the balance. This procedure should fully compensate the appellant **while not providing her with unjust enrichment**." *Id.* at 664 (Emphasis added.) *See also Loffland Brothers Co. v. Huckabee*, 373 F.2d 528 (5th Cir. 1967).

However, with *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), the Fifth Circuit Court erroneously went beyond its established precedent and reduced a plaintiff's award against a non-settling defendant, not by the dollar amount of a previous settlement, but by "the dollar amount represented by the proportion of negligence, if any, attributed to the settling parties." *Leger*, 592 F.2d at 1248. The *Leger* Court reasoned that any other method of crediting the non-settling tort-feasor for the settlement would be tantamount to "rejecting the *Reliable Transfer* reasoning." *Id.* at 1249.

Two months after the *Leger* decision, this Court decided *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979), which reaffirmed the principles of joint liability and a plaintiff's corresponding right to recover from any tort-feasor the full compensation for damages incurred. The court stated:

> Nothing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear that if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss.

Edmonds, 443 U.S. at 260, n.7; *quoting The Atlas*, 93 U.S. 302, 23 L.Ed. 863 (1876).

The *Edmonds* court recognized that *Reliable Transfer* merely changed the method of apportionment of damages from equal division to division based on comparative fault. *Edmonds*, 443 U.S. at 271, n.30. The court specifically stated, "But we did not upset the rule that the plaintiff may recover from *one* of the colliding vessels the damage concurrently caused by the negligence of both." *Id.* (Emphasis in original).

Recognizing this Court's reaffirming of the principles of joint liability in *Edmonds*, the Eleventh Circuit in *Self v. Great Lakes Dredge & Dry Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988), declined to follow *Leger* and held that a plaintiff's recovery against a non-settling tort-feasor must be reduced by the dollar amount of the settlement with a joint tort-feasor, resulting in the plaintiff receiving the exact amount of his damages. *Self*, 832 F.2d at 1548. *See also Hernandez*, 841 F.2d at 591; *Constructores Tecnicos v. Sea Land Service*, 945 F.2d 841 (5th Cir. 1991); *Cf. Joia v. Jo-Jo Service Corp.*, 817 F.2d 908 (1st Cir. 1987), *cert. denied*, 484 U.S. 1008, 108 S.Ct. 703, 98 L.Ed.2d 654 (1988); and *In the Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992). Both *Joia* and *Amoco Cadiz* recognized *Edmonds'* re-affirmance of joint liability in the admiralty context even beyond cases governed by the Longshore and Harbor Workers' Compensation Act. These Circuits'

recognition of the importance of applying *Edmonds* indicates their preference for the *pro tanto* method.

B. The *Pro Tanto* Method of Reduction Is The Most Universally Accepted.

Not only have several of the Federal Courts of Appeal which have considered the issue chosen the *pro tanto* method of credit as the preferred methodology, but the *pro tanto* method of reduction is the most universally accepted method of crediting a defendant for another defendant's settlement. Thirty-four of the fifty states of the United States provide for the reduction of a plaintiff's award by the dollar amount of any settlement with a joint tort-feasor.[7] Moreover, the American Law Institute's Restatement (Second) of Torts calls for a dollar-for-dollar reduction of plaintiff's award if there has been payment by less than all joint tort-feasors.[8] Federal courts have

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[7] See Brief for the United States as Amicus Curiae Supporting Petitioner, pp. 14-15, n.8. As discussed, *infra*, Texas law allows non-settling tort-feasor to select the method of reduction prior to trial. Tex. Rev. Civ. Stat. Ann. Title 2 §33.012, .014. New York law requires the reduction of a plaintiff's award by the dollar amount of settlement or the settling tort-feasor's proportion of liability, whichever is greater. N.Y. Gen. Oblig. Law §15-108.

[8] Restatement (Second) of Torts §885(3) (1977) is as follows:

> A payment by any person made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors, at least to the extent of the payment made, whether or not the person making the payment is liable to the injured person and whether or not it is so agreed at the time of payment or the payment is made before or after judgment.

also adopted the dollar-for-dollar credit methodology in securities cases,[9] and the *pro tanto* method has been applied over the *pro rata* method in civil rights litigation[10] and in Title VII actions.[11]

The courts of the United Kingdom also follow the *pro tanto* method of reduction when settlements with less than all joint tort-feasors are involved.[12] The principle underlying the rule is the same as in the courts of the United States: "in every tort, there is only one damage."[13]

The rationale behind the adoption of the *pro tanto* method of reduction is to provide full satisfaction while not unjustly enriching the plaintiff. *See Billiot, supra.* This rationale was also behind the court's reasoning in *Hernandez*, 841 F.2d at 591, and in *Self*, 832 F.2d at 1548, n.6. Several states have also observed that the policy against

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[9] *See Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989); *TGB, Inc. v. Bendis*, 811 F.Supp. 596 (D. Kan. 1992); *Federal Savings & Loan Insurance Corp. v. McGinnis, Juban, Bevan, et al.*, 808 F.Supp. 1263 (E.D. La. 1992); *Federal Deposit Insurance Corp. v. Geldermann, Inc.*, 763 F.Supp. 524 (W.D. Okla. 1990), *rev'd on other grounds*, 975 F.2d 695 (10th Cir. 1992).

[10] *See Miller v. Apartments & Homes of N.J., Inc.*, 646 F.2d 101 (3d Cir. 1991).

[11] *See Sears v. Atchison, Topeka & Santa Fe Ry.*, 749 F.2d 1451 (10th Cir. 1984), *cert. denied sub nom., United Transp. Union v. Sears*, 471 U.S. 1099, 105 S.Ct. 2322, 85 L.Ed.2d 840 (1985).

[12] *See Bryanston Finance Ltd. v. de Vries*, (1975) 1 QB 703 (espousing the rule that a plaintiff may enforce a judgment for the excess over that which he has already recovered and holding that a plaintiff who settled with one or several defendants for £1000 could recover no more from other defendants, as the damages were assessed at only £500.)

[13] *Bryanston Finance Ltd.*, (1975) 1 QB at 722.

double recovery supports application of the *pro tanto* method of reduction rather than the *pro rata* method.[14] As one court observed, "The principle behind this [*pro tanto*] credit is that **the injured party is entitled to only one satisfaction for a single injury** and the payment by one joint tortfeasor inures to the benefit of all." *Sanders*, 489 N.E.2d at 120 (Citations omitted, emphasis added).

C. The *Pro Tanto* Method is Consistent With Principles of Both Comparative Fault and Joint Liability.

By affirming the Fifth Circuit's decision herein, this Court would be establishing a bright line rule which recognizes that, as to parties actually before the Court and jury, principles of comparative fault apply, but they do not operate to abrogate the principles of joint liability and a plaintiff's corresponding right to recover the full amount of damages from the parties before the Court. The adoption of the *pro tanto* method of reduction would firmly establish that, under the general maritime law of the United States, a plaintiff is entitled to recover the amount of damages determined by the jury – no more and no less.

The Fifth Circuit applied principles of comparative fault by affirming the district court's apportionment of

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[14] *See, e.g., Boyken v. Steele*, 847 P.2d 282 (Mont. 1993); *Walihan v. St. Louis-Clayton Orthopedic Group, Inc.*, 849 S.W.2d 177 (Mo. App. E.D. 1993); *Sanders v. Cole Municipal Finance*, 489 N.E.2d 117 (Ind. App. 3 Dist. 1986); *Martinez v. Lopez*, 300 Md. 91, 476 A.2d 197 (1984); *Popovich*, footnote 5, *supra*, 412 N.E.2d at 521; *Santiago v. Santiago*, 121 R.I. 88, 402 A.2d 1189 (1979).

fault among plaintiff and non-settling defendants, AmClyde and River Don, but the Court also insured that McDermott received full satisfaction for the amount of damages to which the jury found it was entitled by reducing plaintiff's award (after adjustment for petitioner's comparative negligence) by the dollar amount of the settlement reached with settling sling defendants. The Fifth Circuit, therefore, remained true to the principles set forth in this Court's rulings in *Reliable Transfer* and *Edmonds*. McDermott now cries foul, apparently because it was not able to obtain a "double recovery" which would occur under the *pro rata* reduction method advocated by McDermott.

Contrary to the *Leger* Court's analysis, application of a *pro tanto* reduction of a plaintiff's award is not a rejection of *Reliable Transfer*. In fact, the Fifth and Eleventh Circuit Courts of Appeals applying the *pro tanto* method have also applied principles of comparative fault in both personal injury and collision cases.[15]

The *pro tanto* method of reduction of a damage award is the only method which allows for application of principles of comparative fault without rejecting the principles of joint liability. A plaintiff is free to seek full recovery for his damages by pursuing an action against any of the joint tort-feasors and will recover the amount of damages determined by the jury, but principles of comparative fault apply to parties participating at trial. If the plaintiff

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[15] *See, e.g., Constructores Tecnicos*, 945 F.2d at 850; *Drake Towing Co., Inc. v. Meisner Marine Constr. Co.*, 765 F.2d 1060 (11th Cir. 1985).

settles with one or more of the joint tort-feasors, principles of joint liability are not abrogated. Neither are principles of comparative fault. The jury determines the degrees of fault, if any, of the parties before it and the amount of damages suffered. The plaintiff is entitled to recover that amount less the dollar amount represented by his own comparative negligence and less the dollar amount of the settlement. The plaintiff, therefore, receives the exact amount of damages to which the jury has found him entitled and the non-settling defendants participating at trial contribute to the damages according to their judicially determined degrees of fault.

The decision of the Fifth Circuit below and its prior decision in *Hernandez, supra*, adheres to the rule that plaintiffs are only entitled to one recovery for the damages suffered. *See McDermott, Inc. v. Clyde Iron, et al.*, 979 F.2d 1068, 1079 (5th Cir. 1992); *Hernandez*, 841 F.2d at 591. A plaintiff can expect and demand nothing more. Application of the *pro tanto* method of reduction insures that the plaintiff receives nothing more than what the jury has determined are its damages. The comparative fault principles espoused by *Reliable Transfer* are not abrogated, but rather followed, in determining the percentages of fault of the parties before the Court who remain liable for the remainder of plaintiff's damages not satisfied through settlement according to their degrees of fault.

D. The *Pro Tanto* Method of Reduction Promotes Settlement, Judicial Economy and Fairness.

One of the fundamental differences between the *pro tanto* and *pro rata* methods is in the allocation of risk of an

insufficient settlement. By insuring that the plaintiff receives one satisfaction for his damages, the *pro tanto* method places the risk of the plaintiff entering into an insufficient settlement on the non-settling tort-feasor. Conversely, the *pro rata* method places the risk of an insufficient settlement on the plaintiff.[16] Courts which have analyzed this consideration have stated that, in order to be consistent with the principles of joint liability which facilitates full compensation of an injured plaintiff, this risk is more properly placed on the tort-feasor.[17]

By placing the risk of an insufficient settlement on the tort-feasor and insuring that a plaintiff receives full recovery of his judicially determined damages, the *pro tanto* method encourages settlement.

Under the *pro rata* method, a settling plaintiff faces two critical uncertainties which create a disincentive to settlement. First, settlement with one defendant could leave him unable to collect the balance of the total assessed damages from the remaining defendants. Second, the full effect of settlement cannot be known until the trier of fact determines the settling party's relative

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[16] *See, e.g., Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154 (5th Cir. 1985) (following *Leger*; the Court awarded the plaintiff $390,000 from non-settling defendants which, when combined with the "Mary Carter" settlement (see footnote 22, *infra.*) from the settling defendant, amounted to $422,000 out of a $650,000 jury award); *Kizer v. Peter Kiewit Sons' Co.*, 489 F.Supp. 835 (N.D. Cal. 1980) (plaintiff received $117,898 in settlement and judgment, even though the jury awarded $233,694, because the *pro rata* method was used.)

[17] *See Geldermann*, 763 F.Supp. at 531 (The risk of settlement "should more rightly be allocated to joint tortfeasors.")

fault. Therefore, a plaintiff must prosecute his case in the shadow of a phantom defendant who is unrepresented at trial, but is assessed a degree of fault. The settling defendants' fault inures to the detriment of the plaintiff when that fault is assessed at a percentage that translates into a dollar amount in excess of the settlement amount.

On the other hand, the *pro tanto* credit allows the plaintiff to actually determine the effect of his settlement. When utilizing a dollar-for-dollar credit, a plaintiff recovers the remainder of his full damages from the non-settling defendant. He is, therefore, more likely to settle with a tort-feasor who may only be marginally liable. For example, under the *pro rata* method, if a plaintiff settles with a relatively impecunious defendant for $15,000 and proceeds to trial against a non-settling defendant who is ultimately assessed 90% of the fault on a total damage award of $500,000, with the remaining 10% being assessed to the settling party, plaintiff will only collect $465,000 total, even though the jury found he was entitled to $500,000. Under the *pro tanto* method, however, if a plaintiff enters a cost-of-defense type settlement with one defendant, he will not thereafter be barred from recovering the remainder of his full damages from the remaining defendant.

The *pro tanto* method also promotes settlement with defendants which have limited assets or insurance coverage, because the plaintiff may recover his full damages from the non-settling tort-feasor. Conversely, under petitioner's proposed method, the plaintiff has little incentive to settle for the insurance policy limits of a defendant, because he runs the risk that the settling defendant will

be found liable for a large percentage of fault. The plaintiff is better off keeping the would-be settling defendant in the litigation so that he may recover all of his damages, regardless of the allocation of fault, from the "wealthier" defendant under principles of joint liability. The litigation is thus unnecessarily prolonged and complicated.

Moreover, under the *pro rata* method, after a settlement with one defendant, the posture of the case changes dramatically, often on the eve of trial. Because of the settlement, the non-settling defendant is in the position of having to bear the burden of proving the fault of the settling defendant. Witnesses not in the defendant's control must be located, and trial strategies must be revised, all at great expense to the parties and to judicial economy. The plaintiff is put in the awkward position of having to defend the actions of a party he once blamed, the now unrepresented settling defendant. The trial is thus prolonged and complicated by litigating the fault of the absent, unrepresented party. In multi-party litigation, the burden on the jury's time and perception is already considerable. To add to this burden by asking the jury to consider evidence of the fault of unrepresented, absent parties and to allocate fault between those absent parties and the litigating parties is to negate the advantages of partial settlement, i.e., simplification of the litigation and conservation of judicial resources.

Conversely, the *pro tanto* method promotes judicial economy. The amount of reduction of a plaintiff's ultimate award is known from the moment of settlement, and litigation is simplified by making consideration of the unrepresented settling defendant's fault unnecessary. Indeed, in the instant litigation, the trial would have

conceivably lasted one week longer had respondent sought to introduce evidence of the sling defendants' fault rather than relying on the dollar-for-dollar credit.

Petitioner and Amici submit that fairness requires adoption of the *pro rata* method of reduction. Respondent submits, however, that the *pro tanto* method is no more unfair than the *pro rata* method. Adoption of the *pro rata* method in this case, as well as its application in past cases, would result in a patently *unfair* windfall to the plaintiff. Moreover, the contention that a plaintiff should not be able to recover from the non-settling defendant the full amount of his damages when he has made a "bad settlement" is nothing more than an attack on the inequities of joint and several liability, which is well established in the common law and maritime law. Many instances exist outside of the context of settlement credits where one of several tort-feasors bears a greater burden of damages, either because no right of contribution exists against the other tort-feasors or they are statutorily immune, insolvent, or unable to be found. As observed by the court in *In the Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992), the *Edmonds* decision, although based in part on an interpretation of the Longshore & Harbor Workers' Compensation Act, also considered whether reduction of the claimant's damages by the amount of fault attributable to his employer would be wise. As noted by the *Amoco Cadiz* court, the *Edmonds* court concluded that claim reduction would be unwise, because it would complicate litigation and reduce the injured person's recovery. *Amoco Cadiz*, 954 F.2d at 1316, *citing Edmonds*, 443 U.S. at 268-273. The *Amoco Cadiz* court noted:

> The [Edmonds] court acknowledged the inequity of requiring a person 20% at fault to pay 90% of the damages but observed that such disproportion has been tolerated since the creation of the rule of joint and several liability. Attempts to redress this inequity create problems of their own, including failure to compensate the victim if one of the responsible parties cannot (or as in *Edmonds* need not) pay.

Amoco Cadiz, 954 F.2d at 1316-17. Moreover, while petitioner and Amici argue that the *pro tanto* method does not allow parties to bear the benefit or burden of their settlement, the *Self* court recognized that the *pro tanto* method results in the claimant receiving the exact amount of his damages, and "[t]he risk or wisdom of settling in contrast to going to trial falls upon whichever tortfeasor had the best foresight." *Self*, 832 F.2d at 1548, n.6.

The alleged opportunity for collusion under the *pro tanto* method referred to by petitioners and Amici is alleviated by the requirement that any settlement agreement be made in good faith. Contrary to petitioner's representations, the opportunity for a non-settling defendant to question the good faith of a plaintiff's settlement is not a fatal aspect of the *pro tanto* method. Good faith inquiries can be and have been conducted quite expeditiously.[18] If a non-settling defendant, after reasonable investigation, believes that a settlement was not entered into in good faith, he can request that the court review the documentary evidence of record to make its determination. A full evidentiary hearing or "mini-trial"

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[18] *See, TGB, Inc.*, 811 F.Supp. at 605; *Geldermann*, 763 F.Supp. at 531.

regarding the good faith of a settlement is not a necessary corollary to the *pro tanto* method.[19]

II. THE *LEGER*-TYPE *PRO RATA* METHOD IS FLAWED.

A. Reduction of a Plaintiff's Award Based on Allocation of Fault Among Litigating and Absent Parties Results in Either a Double or an Insufficient Recovery and Unnecessary Complication of Litigation.

Petitioner and Amici advocate the application of the minority approach: a *pro rata* reduction so that the dollar amount corresponding to the percentage of fault attributable to a settling defendant is reduced from the award, rather than deducting the actual dollar amount of the settlement. This argument is based on *Leger, supra*, and cases subsequent to it adopting similar *pro rata* or proportionate credit methods. The rationale of *Leger* is hopelessly flawed, however, and should not form the basis for a uniform general maritime rule. The facts of *Leger* illustrate some of these flaws.

In *Leger*, the jury only awarded $284,090, but the plaintiff received $310,171.55, because the *pro rata* method was used.[20] In crediting the non-settling defendant for

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[19] *See, Geldermann*, 763 F.Supp. at 531.

[20] In *Leger*, the plaintiff sued several defendants for personal injuries under the general maritime law and the Jones Act. On the morning of trial, Leger settled his claims against two defendants for $182,331.05. At trial the jury awarded Leger $284,090. Because the settlement contained a "Mary Carter" provision whereby Leger would pay one-half of any funds collected by him from the non-settling defendant back to the settling defendants, it should have been revealed to the jury so that it could have appropriately considered the potential bias of non-settling defendants' employee witnesses. The district court ordered a new trial to determine the parties' negligence. At the second trial, the jury found the non-settling defendant 45% negligent, Leger 35% negligent and one settling defendant 20% negligent. The district court entered judgment against the non-settling defendant for $127,840, the amount equal to its percentage of fault multiplied by the total amount of damages determined at the original trial. In other words, the jury's award was reduced by the amount represented by the plaintiff's proportionate share of negligence as well as the settling defendant's proportionate share of negligence.

the previous settlement, the district court applied several rules to determine the reduction of plaintiff's award. Specifically, the district court held, *inter alia*:

> (4) When two or more parties have contributed by their fault to cause injury to another, the liability for such damage is to be allocated among the parties proportionately to the comparative degree of fault.
>
> (5) A tortfeasor seeking to assert a reduction by the degree of fault of alleged joint tortfeasors must prove by a preponderance of the evidence that the settling defendant was, in fact, at fault.
>
> (6) A settling party's negligence is considered *only when he has been made a party to the suit*. In such a case, the judgment awarded to the claimant against the non-settling defendant is credited with the dollar amount represented by the proportion of negligence, if any, attributed to the settling parties.

Leger v. Drilling Well Control, Inc., 69 F.R.D. 358, 362-63 (W.D. La. 1976), *aff'd* 592 F.2d 1246 (5th Cir. 1979); *Leger*, 592 F.2d at 1248. (Footnotes omitted, emphasis added).

In support of these "rules," both the district court and the Fifth Circuit, which adopted the district court's language, cite *Reliable Transfer, supra*. While noting that *Billiot, supra, Loffland Brothers Co., supra,* provided that non-settling defendants were to be credited with the dollar amount of a previous settlement in order to avoid double recovery by the plaintiff, the Fifth Circuit stated:

> In our view, the *Leger* rules accommodate the interest of fairness and deterrence without sacrificing the policy against double recovery upon which *Billiot* and *Loffland* were founded.

Leger, 592 F.2d at 1249. (Footnote omitted).

The *Leger* rules' "preservation" of the policy against double recovery, however, is a fiction. After receiving significantly more than the jury determined Leger was entitled to, the Fifth Circuit stated, "Leger did not receive a double recovery for his injuries." *Id.* at 1250. The court went on to observe:

> Although Leger nominally received $310,171.05 by virtue of the settlement and the judgment, we do not consider this a double recovery. Leger merely obtained a favorable settlement.

Id. In a footnote, the Fifth Circuit admitted that:

> [T]he condition vel non of double recovery depends on whether one totals the absolute dollar figures of recovery and matches the total against the total damages or whether one totals the percentages of fault and sees that the total does not exceed 100%.

Id. at 1250, n.10. Without citation to any authority whatsoever, the footnote simply concluded, "Considering the competing principles involved we choose the latter." *Id.*

Despite the rejection of the *Leger* approach and the return to the *pro tanto* method of reduction by several panels of the Fifth Circuit, including the Court of Appeals below, petitioner invites this Court to engage in the same sophistry used in *Leger* which has now been rejected. Although the plaintiff in *Leger* and other plaintiffs benefiting from the application of *Leger*'s rules may not have recovered 200% of the damages awarded, they have in fact received "double recoveries" by recovering more than the jury's award.

Additionally, as noted by the Fifth Circuit in *Leger*, the *pro rata* method of reduction could result in a plaintiff recovering much less than the amount the jury awarded. *Leger*, 592 F.2d at 1250. For instance, a plaintiff could settle with one tort-feasor for $50,000 and proceed to trial against a joint tort-feasor. If the jury determines that the settling tort-feasor is 90% at fault, the non-settling tort-feasor is 10% at fault and that total damages are $100,000, plaintiff will only recover $60,000. This result is directly contrary to the principle of joint liability whereby a plaintiff may recover the entire amount of his damages from any one joint tort-feasor. *See Edmonds, supra.*

B. The *Pro Rata* Method Invites Collusion.

Leger allows consideration of a settling party's negligence only if he has been made a party to the suit.[21] In practice, however, this is an open invitation to collusive settlements. Prior to instituting an action, a plaintiff could settle with one party against whom he has a potential claim, perhaps for a significant amount of money, and thereafter file suit only against a joint tort-feasor who may be only slightly at fault. Under the *Leger* rules, the plaintiff could recover from the non-settling tort-feasor, in addition to his pre-litigation settlement dollars, 100% of the damages determined by the trier of fact, thus resulting in a double recovery. Because most courts adopting a *pro rata* method of reduction also adopt a rule whereby claims for contribution against the settling party are barred, the non-settling tort-feasor will have no recourse against the settling tort-feasor.

Collusion is also possible after litigation is instituted against all parties. Because the *pro rata* method requires consideration of the non-settling defendant's fault, evidence of that fault will be presented at trial, but the non-settling defendant will be unrepresented. Typically, a plaintiff has an incentive to offer the defendant of his choice an opportunity to settle in exchange for "cooperation" in establishing the other defendants' liability and in minimizing the plaintiff's and the settling defendant's liability. The result is that one of the litigating parties has a distinct advantage over the other by having access to information, documents and witnesses of one or more of

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[21] *Leger*, 592 F.2d at 1248.

the potentially culpable parties. If the settling defendant and plaintiff enter into a "Mary Carter"[22] type of settlement, under which the settling defendant is refunded a portion of the plaintiff's recovery from remaining defendants, the incentive for collusion between the plaintiff and the settling defendant is even greater, because the settling tort-feasor has an additional financial motive to make witnesses unavailable and for its employees to place as much blame on the non-settling defendants as possible.

At the same time, the non-settling defendants also have an incentive to ban together against the plaintiff by agreeing to place all of the blame on the settling defendant. In either event, the result is the presentation of a distorted picture of the truth to the jury.

III. ALTERNATIVELY, THIS COURT SHOULD FASHION MARITIME LAW TO ALLOW A NON-SETTLING DEFENDANT TO CHOOSE THE METHOD OF REDUCTION, BECAUSE IT PROMOTES FAIRNESS AND DISCOURAGES COLLUSIVE SETTLEMENTS.

As previously noted, neither the *pro rata* nor the *pro tanto* method of crediting a non-settling defendant for a previous settlement is without flaw.[23] The American Law

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[22] The term is derived from the agreement in *Booth v. Mary Carter Paint*, 202 So.2d 8 (Fla.App.1967); *see also* discussion of the agreement in *Leger*, at n.17, *supra*; *Bass*, 749 F.2d at 1156, n.2.

[23] *See* Restatement (Second) of Torts §886A, Contribution Among Tort-feasors, comment m (1965) ("Each [method] has its drawbacks and no one is satisfactory.")

Institute has refused to recommend one approach over the other.[24]

Respondent suggests that many of the difficulties presented by both approaches could be obviated by this Court fashioning a rule to be applied in maritime tort cases whereby the non-settling defendant has the option to choose the method of reduction. Under respondent's alternative proposal, a non-settling defendant would designate either the *pro rata* or the *pro tanto* method of reduction for any previous settlements by plaintiff. Support for the proposal is found in legislation passed by the States of Texas and New York.

The State of Texas[25] provides a statutory scheme whereby the non-settling defendant may elect, prior to

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[24] Restatement (Second) of Torts §886A, comment m(3) states: "The Institute leaves these issues to a caveat and takes no position."

[25] Tex. Rev. Civ. Stat. Ann., Title 2 provides:

§33.012. Amount of Recovery

(a) If the claimant is not barred from recovery under Section 33.001, the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility.

(b) If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a credit equal to one of the following, as elected in accordance with Section 33.014:

(1) The sum of the dollar amounts of all settlements; or

(2) a dollar amount equal to the sum of the following percentages of damages found by the trier of fact:

trial, which method of reduction will be employed: a dollar-for-dollar credit or a "sliding scale" percentage of damages credit.

A similar approach is the method adopted by the State of New York. Under that method, if there has been a settlement with less than all joint tort-feasors, the damages awarded to the plaintiff are reduced by the dollar amount representing the settling defendants' percentage

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(A) 5 percent of those damages up to $200,000;

(B) 10 percent of those damages from $200,001 to $400,000;

(C) 15 percent of those damages from $400,001 to $500,000.

(D) 20 percent of those damages greater than $500,000.

(c) The amount of damages recoverable by the claimant may only be reduced once by the credit provided in Subsection (b).

* * *

§33.014. Election of Credit for Settlements

(a)[1] If a claimant has settled with one or more persons, an election must be made as to which dollar credit is to be applied under Section 33.012(b). This election shall be made by any defendant filing a written election before the issues of the action are submitted to the trier of fact and, when made, shall be binding on all defendants. If no defendant makes this election or if conflicting elections are made, all defendants are considered to have elected Subdivision (2) of Section 33.012(b).

[1] So in enrolled bill. There is no (b).

Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2 §2.08, eff. Sept. 2, 1987.

of fault, or by the dollar amount of the settlement, whichever is greater.[26] The major purposes of the rule are to provide incentives for settlement between plaintiffs and defendants, while at the same time insuring that the non-settling defendant does not have to bear an inequitable share of liability, simply because other parties have chosen to settle. *See Purcell v. Doherty*, 102 Misc.2d 1049, 424 N.Y.S.2d 991 (1980), *aff'd* 80 A.D.2d 755, 437 N.Y.S.2d 993 (N.Y.A.D. 1 Dept. 1981).

Allowing the non-settling defendant to choose either the *pro rata* or the *pro tanto* method of reduction would solve two significant problems. First, giving the non-settling defendant the choice as to the method of reduction would eliminate any possibility of collusive settlements. With the non-settling defendant having an option, any attempt at collusion would be futile because the settling parties would not know which method would be chosen, thereby making it impossible for them to be

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[26] N.Y. Gen Oblig §15-108 provides in pertinent part:
(a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

certain that their settlement would achieve its desired result.

The second problem which the alternative method would solve is the inherent unfairness that can result when a non-settling defendant is forced to live with the results of a settlement to which it was not a party. For example, under the *pro tanto* approach, if the plaintiff settles for a nominal amount with a defendant that would have had substantial fault, the non-settling defendant is effectively forced to bear the burden of the plaintiff's "bad settlement," because it can be condemned to pay the damages necessary to make the plaintiff whole even though its relative culpability is substantially smaller than that of the settling defendant. Likewise, under the *pro rata* approach when the plaintiff settles with a defendant who would otherwise bear primary responsibility, the dynamics of the trial operate to make it likely that the non-settling defendant will be assessed greater fault than it should bear. Allowing the non-settling defendant to choose the credit method is justified, because he is not a party to the settlement, and it should not operate to his detriment.

The alternative approach solves this problem by allowing the non-settling defendant to evaluate its culpability relative to that of the settling defendant, as well as the relationship of the settlement amount to the overall value of the case and to choose a method of reduction. In so doing, rather than being forced to live with the plaintiff's bargain, the defendant is allowed to make a reasoned assessment of the impact of the settlement and to choose what it believes will be the most advantageous form of reduction from its perspective. The approach is

more equitable, because it allows the non-settling defendant to control its own destiny by making a reasoned assessment of the relative risks and benefits of using either the *pro rata* or *pro tanto* approach.

Adoption of this proposal by the Court would allow plaintiffs to settle with less than all joint tort-feasors but allow non-settling defendants to evaluate their relative culpability, as well as the strength of the evidence tending to establish the settling defendant's fault, and either choose the method of reduction or enter into a fair settlement.

CONCLUSION

This Court should affirm the decision of the United States Court of Appeals for the Fifth Circuit and adopt the dollar-for-dollar credit in cases governed by the general maritime law. It is the only method of reduction which remains true to both the principles of joint liability – by insuring that the plaintiff recovers the full amount of his judicially determined damages – as well as the principles of comparative fault – which govern the allocation of liability among the parties participating at trial.

The *pro tanto* method encourages settlement, promotes judicial economy, prevents double or insufficient recovery, and avoids the inefficiency, confusion and collusion associated with the *pro rata* or proportionate method of reduction advocated by petitioner.

Alternatively, this Court should fashion a rule which allows the non-settling defendant to choose the credit

method, as this will alleviate much of the unfairness posed by either method of reduction.

Wherefore, respondent, River Don Casting, Ltd., prays that this honorable Court affirm the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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No. 92-1479

In The

Supreme Court of the United States

October Term, 1993

McDERMOTT, INC.,

Petitioner,

vs.

AmCLYDE, A DIVISION OF AMCA INTERNATIONAL, INC. and RIVER DON CASTINGS, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

STATEMENT OF THE CASE

River Don[1] acknowledges that both the Shearleg crane and SNAPPER deck were damaged in the 10 October 1986 incident; thus admitting that McDermott suffered actual damages to the Shearleg crane for which it was denied compensation from the hook defendants.

River Don mischaracterizes McDermott's acceptance of comparative liability for damages caused by the failure

[1] River Don is sometimes referred to herein, collectively with its trial co-defendant, as "hook defendants."

of the cable laid slings by attempting to obscure the fact that this stipulation was expressly made in the context of the sling defendants'[2] settlement and involved a stipulation or admission that the slings were *a* cause of damage.

River Don attempts to obscure the jury's determination of the sling defendants' liability, along with McDermott's, through apportionment of causation. River Don claims that the hook defendants only presented evidence of McDermott's *negligence* in regard to the sling failure, ignoring the fact that McDermott had accepted its and the sling defendants' liability for the sling failure, and stipulated to the slings' causation of damage, leaving only comparative apportionment by causation for the jury.[3] Neither McDermott's nor the sling defendants' "fault" was in issue. Only the extent of the slings' causation of damage was tried.

Hook defendants took full advantage of McDermott's tactical decision to accept the sling defendants' liability, repeatedly having the jury instructed to allocate a share of liability to the parties jointly responsible for the slings: "McDermott/Sling defendants."[4] Every bit of evidence offered by the hook defendants on their theory that the sling failure was the sole or primary cause of the accident was at least as inculpatory to the sling defendants as to

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[2] "Sling defendants" refers collectively to British Ropes, Ltd., International Southwest Slings, Inc. and Hendrik Veder, B.V., also the settling defendants herein.

[3] Joint Appendix pp. 27-31, 33-35, 40 and 42.

[4] Joint Appendix pp. 26-28, 31-32, 38, and 40; Petition Appendix p. A-37.

McDermott. Indeed, the hook defendants argued vociferously at trial and to the Fifth Circuit that they had been foreclosed from presenting evidence of McDermott's fault – never recognizing that *causation not fault* with regard to the sling failure was the material issue at trial.

The Court of Appeals' undisputed determination that, in fact, causation not fault had been the liability allocation mechanism given to and used by the jury disposes of River Don's misconceptions about proof of "McDermott/Sling defendants" "fault". Petition Appendix pp. A-31-32. Moreover, hook defendants did not object to or assign as error the jury interrogatory which combined "McDermott/Sling defendants" for allocation of comparative liability. Petition Appendix p. A-37. In argument, River Don suggests that trial would have lasted a week longer had it had to litigate fully the sling defendants' fault, ignoring that the hook defendants had made their own tactical decision not to urge third-party claims against the sling defendants, but rather had focussed on attempts to cast fault upon McDermott for the sling failure. River Don also conveniently omits the fact that, in the absence of McDermott's settlement and stipulation of combined liability with the sling defendants, trial would have taken a week longer due to McDermott's presentation of its "failure to warn" and warranty cases against the sling defendants in rebuttal to the hook defendants' allegations of misuse of the slings.[5] This Honorable Court should not be misled to think that a four week jury trial was conducted on only River Don's

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[5] Joint Pre-Trial Order, pp. 8-9, 13-18, 70-80, 89-91; Record Doc. 285.

theory and evidence as its propagandized "Statement of the Case" suggests.

It is also a mischaracterization to suggest, as River Don does, that *Hernandez v. M/V Rajaan*, 841 F.2d 582 (5th Cir.), *modified on other grounds*, 848 F.2d 498, *cert. denied*, 488 U.S. 981, 109 S.Ct. 530, 102 L.Ed. 2d 562 (1988) was prevailing authority in the Fifth Circuit prior to its firm adoption in the present case. The Court of Appeals in *Williams v. Fab-Con, Inc.*, 990 F.2d 228, 233 (5th Cir. 1993) said,

> "This court has noted that *Hernandez* and *Leger* are at odds, but our recent opinion in *McDermott, Inc. v. Clyde Iron, et al.* . . . clearly holds that . . . *Hernandez* is the law of this Circuit. Because the district court did not have the benefit of our decision in *McDermott*, we vacate the damage award to Fab-Con, and remand for reconsideration by the district court. [footnote omitted]"

Southern District of Texas Magistrate Judge Kelt also lacked the dubious benefit of the Fifth Circuit's decision in this case, as did the litigants at settlement and trial. Equal protection, therefore, requires remand in the present matter.

ARGUMENT

I. There is a genuine choice to be made in this case between *pro tanto* and proportionate contribution regimes.

Respondent, River Don's opening dissemblance that neither *pro tanto* nor proportionate "credit for settlement" provides a flawless procedure to account for settling defendants' shares of liability begs the question of which is better and which *one*, should apply in this case.

A. The *pro tanto* credit is incompatible with comparative liability.

The Maritime Law Association of the United States and the United States as amici curiae and the National Conference of Commissioners on Uniform State Laws, among others, have recognized that in the comparative liability environment of maritime law, a consistent, proportionate "settlement credit" or "contribution short-cut" is the appropriate means of fairly adjusting the equities among all parties.

> "The NCCUSL has promulgated two uniform contribution Acts – the first in 1939, superseded by a revised act in 1955. Both of these Acts provide for pro rata [equal share or "dollar for dollar"] contribution which may be suitable in a state not applying the principle of comparative fault, *but is inappropriate in a comparative-fault state apportioning ultimate responsibility on the basis of the proportionate fault of the parties involved.*"

Prefatory Note, Uniform Comparative Fault, Act 12 U.L.A. 43 (Supp. 1992) (emphasis added). River Don still fails to identify the legal basis in the maritime law of comparative liability for its claimed "right" to a "credit" for third parties' private contractual resolution of their liabilities with McDermott, Inc. In the comparative liability system of maritime tort law, proportionate contribution is the means by which equities between co-tortfeasors are settled. *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc. et al.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed. 2d 694 (1974). Thus, McDermott, Inc. does not agree that non-settling defendants are entitled to a "credit," for that term denotes a creditor/debtor relationship that does not exist here; rather, McDermott, Inc. contends that River Don was entitled to and received a trial at which the proportionate liabilities of all actors, plaintiff, settling defendants and non-settling defendants, were presented and verdict and judgment rendered thereon. What all – even River Don – do agree on is that only *one* contribution scheme should be applied, not *both* as the Fifth Circuit erroneously did in this case. The underlying rationale of the "one satisfaction rule," of which River Don makes so much, is at least as much offended by a defendant's obtaining double contribution as it would be if a plaintiff obtained a double recovery.

B. The *pro tanto* one satisfaction rule provides no basis for the Court of Appeals' double reduction of McDermott's recovery.

The "one satisfaction rule," as posited by River Don, is a vestige of the pre-comparative liability, pre-third party practice, common law tort regime that *United States*

v. Reliable Transfer, 421 U.S. 397, 95 S.Ct. 708, 44 L.Ed. 2d 251 (1975) laid to rest. River Don's reversion to 19th century authorities in its extrapolation of a "one satisfaction rule" from the rule of joint and several liability among co-tortfeasors amply demonstrates the anachronism of its theory. Development of third party practice under the Federal Rules of Civil Procedure and of comparative liability in maritime law under *Reliable Transfer* superseded the ancient common law tort system that required an injured party to sue each tortfeasor individually, collecting as much of his damages as he could, with no contribution between them. In that former legal environment, River Don's "pro tanto one satisfaction rule" was probably the best that could be done. Since *Reliable Transfer*, greater fairness is attained by proportionate allocation of liability and the proportionate "one satisfaction rule" established in the Fifth Circuit by *Leger v. Drilling Well Control*, 592 F.2d 1246, 1250 n. 10 (5th Cir. 1979):

> " . . . one totals the percentages of fault and sees that the total does not exceed [or fall short of] 100%."

All parties are, thereby cast with their proportionate shares of liability, which they satisfy by paying the plaintiff the judgment amount or an amount agreeable to plaintiff in settlement. Plaintiffs and settling defendants are bound by their bargain, while non-settling defendants are jointly and severally bound by the judgment. The fundamental inapplicability of the "dollar for dollar" one satisfaction rule in cases involving settlement of comparative liabilities is further demonstrated by the indisputable fact that:

> "If all of the defendants had settled for a sum larger than the trial verdict, the one satisfaction rule would not be violated."

Franklin v. Kay Pro Corp., 884 F.2d 1222, 1232 (9th Cir. 1989), *cert. denied*, 498 U.S. 890, 111 S.Ct. 232, 112 L.Ed. 2d 192 (1990).

Even if a "dollar for dollar" one satisfaction rule applied generally, it would have no effect in this case. River Don wholly ignores the trial court's finding that the sling defendants' settlement did not exceed McDermott's damages, because approximately half of McDermott's total damage claim, its Shearleg Crane damages[6], was foreclosed against River Don and AmClyde, but not against the settling sling defendants. McDermott, even with full benefit of its settlement, did not recover full compensation for its actual damages in this case. River Don also ignores the allocation of settlement proceeds made in the settlement, itself. See Petition Appendix p. A-59-65. As McDermott's damage claims were roughly half for the SNAPPER deck and half for the Shearleg crane, 50/50 apportionment of the settlement between crane and deck damages was reasonable and fair. Since $500,000.00 is less than 30% of McDermott's deck

[6] Shearleg crane damages were discussed at pages 16-18 of Petitioner's original Brief on the Merits. The proffered evidence of crane damages was identical in form to that admitted to prove deck damages. Petition Appendix pp. A-66 and 67. Reduction of the crane damage claim by the same percentage by which the jury reduced the deck damage claim yields $2,439,454.80 as a fair approximation of what plaintiff's crane damage award should have been.

damages, the settlement resulted in no windfall or excess recovery.[7]

The trial court had the proffered evidence of Shearleg crane damages, the settlement agreement and a recently concluded trial to support its decision to deny River Don dollar for dollar credit. The Court of Appeals erroneously claimed to have none of these materials and compounded its mistake by giving the trial court's ruling no deference. The record of the Court of Appeals' error in this regard is sufficiently glaring that River Don cannot merely avoid addressing it before this Honorable Court, as it has in its brief, unless it intends, by its silence, to acknowledge that the Court of Appeals' summary grant of *double* contribution for the sling defendants' liability is insupportable under any theory.

II. The *pro tanto* rule adopted by the Fifth Circuit is unsound and should be rejected.

Respondent's mere reiteration of the Eleventh Circuit's ill-fated rationale in *Self v. Great Lakes Dredge & Dry Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed 2d 604 (1988) cannot repair its error-riddled analysis of *Edmonds* and *Leger* or render such a weak, result-oriented rule applicable to the present case. Simply put, *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753 (1979), had

[7] River Don also ignored the trial court's ruling that " . . . the settling [sling] defendants, . . . were at the most thirty (30%) percent responsible for the accident (no separate contributory negligence, if any, finding was made as to McDermott). . . . " Petition Appendix p. A-52.

nothing to do with settlements; and if it did, application of its rule would result in *no* deduction, credit, or consideration for a settled and released party, just as none was allowed for Edmonds' statutorily immunized employer. *Leger* did not abrogate joint and several liability among co-tortfeasors; rather it reconciled and preserved the co-tortfeasors' contribution rights with the plaintiff's and settling defendant's rights to resolve contractually their portion of the case by settlement. See *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, Nos. 1911251 and 1911252, slip opinion p. 10, 61 U.S.L.W 2745, 1993 W.L. 154448 (Ala. May 14, 1993).

A. The *pro tanto* credit regime provokes non-productive litigation.

Conspicuous by its absence from River Don's discussion of *Self* and cases following its reasoning is any mention of the evolution, to date, of the *Self* rule in the *"Great Lakes Dredge"* litigation. This litigation "horror story", discussed at pages 32-33 of Petitioners' original Brief on the Merits, is clearly not mandated by *Edmonds*, nor suggested by any other case from this Court. *Self* and its scion, *Great Lakes Dredge & Dry Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed. 2d 388 (1992), raise the compelling rhetorical question that punctuated the discussion of contribution in *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1318 (7th Cir. 1992):

> "At all events, why should the judicial system invest so heavily in adjusting accounts among wrongdoers? Neither justification for the tort system – compensation of victims and the creation of incentives to take care – would be served by this collateral litigation."

Nonetheless, that court left the policy question open, as well as the door to further litigation on contribution claims. Imposition of the *Self pro tanto* credit system upon the comparative liability regime of maritime tort law allows the most intransigent wrongdoers to multiply ancillary litigation on contribution or "fairness" of a settlement bar *and* to defend at trial on grounds that someone other than itself – i.e. the settling party – actually caused the accident, receiving an additional comparative reduction in liability to the extent the defense succeeds. Why should the judicial system invest so heavily in allowing non-settling co-tortfeasors to obtain double benefit of settlements by adopting a *pro tanto* credit rule? There is no reason. If a case is to be tried on comparative liability principles, the parties will have to litigate the comparative causation of all actors in the incident, regardless of what rule of settlement credit, contribution, or no contribution is applied. *In re Sunrise Sec. Litig.*, 698 F.Supp. 1256, 1260 (E.D. Pa. 1988). The *pro tanto* credit, therefore, achieves no reduction in cost or complexity but negatively impacts fairness, deterrence and compensation goals of the tort system. Whether the experiences of the states or other countries suggest otherwise, by their varying applications of the *pro tanto* credit for settlement, is not so clear as River Don would have it.

B. State and foreign *pro tanto* credit schemes provide no consensus on a uniform paradigm appropriate to the maritime law of comparative liability.

Though more states have statutorily adopted a form of *pro tanto* credit, the rules employed and their courts' interpretations thereof have not been uniform. Texas, for instance, adopted an "either/or," modified proportionate/*pro tanto* settlement contribution scheme in cases solely sounding in negligence. Cases sounding in warranty, strict liability, or a mixture thereof should continue to be controlled by the proportionate causation rule of *Duncan v. Cessna Aircraft Co.*, 665 S.W. 2d 414 (Tex. 1984); *Gold Kist. Inc. v. Texas Utilities Electric Co.*, 830 S.W.2d 91, 93 n.1 (Tex. 1992), citing *Beech Aircraft Corp. v. Jinkins*, 739 S.W. 2d 19, 20 (1987).[8] As the foregoing example illustrates and as virtually all courts and commentators agree, state laws provide no uniform paradigm for a maritime rule. The government also noted in its amicus brief (at p. 14 n.8) that several states applying a *pro tanto* credit approach do not have a comparative liability system. Thus, the variety of state laws are unhelpful in arriving at a uniform rule of federal maritime law.

The *pro tanto* credit rule applied by the United Kingdom, in a non-maritime case, not involving comparative

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[8] What is notable in the Texas statutory scheme is its express recognition that

> " . . . [t]he amount of damages recoverable by the claimant may be reduced once . . . "

regardless of which credit scheme is chosen.

liability should not be persuasive in the context of American maritime law. The court's references indicate, as did respondents', the anachronism of the rule and its grounding in superseded "no contribution" or "divided damages" systems. In short, though various forms of a *pro tanto* credit for settlement have been applied in a wide range of circumstances, none have solved the fundamental problems of unfairness and inefficiency displayed in the *Self/"Great Lakes Dredge"* litigation and in the Fifth Circuit's double reduction of McDermott's judgment in this case.

C. The *pro tanto* credit unfairly fails to account for non-joint liabilities or damages.

In *Bryanston Finance Ltd. v. deVries*, (1975) 1 QB 703, 722, the court posited that, "in every tort, there is only one damage." In the present case, however, McDermott suffered two classes of damage for which, at the time of settlement, all defendants were potentially liable. Only after the trial court's ruling on the hook defendants' defenses under *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 865 (1986), were the defendants' liabilities for deck and crane damages separated, such that the settling sling defendants proved to have been the only defendants from whom crane damages could have been recovered. The hook defendants were held to have no liability for crane damages; thus, sling and hook defendants were not jointly liable to McDermott on it's crane damages and River Don should have only received a credit for the portion of the settlement attributable to the joint liability

for deck damages. While such a division was relatively easy for the trial court to discern in the present case, since the settling parties stipulated to a division and the proffered evidence of crane damages was fully developed and identical in form to the deck damages presented to the jury, the apportionment of settlement dollars between joint and independent liabilities is another issue open to ancillary litigation under a *pro tanto* credit scheme.

The Court of Appeals' ruling in the present case tossed aside fairness by refusing even to consider the apportionment of settlement funds stipulated by the parties thereto. *McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068, 1080-81 (5th Cir. 1992); Petition Appendix pp. A-27-29. The proportionate contribution "short-cut," developed in *Leger* and *Kay Pro, inter alia*, wholly avoids such problems, for only the parties' liabilities as determined at trial are considered or effected. Hypothetically, had McDermott settled entirely separate contract claims against the sling defendants for $900,000.00, apportioning only $100,000.00 in the agreement to the hook failure incident, under the proportionate allocation scheme, River Don would receive the same proportionate reduction in its comparative liability as if no other claims had been involved. However, with foreknowledge that a *pro tanto* credit would be given, under the same hypothesis, McDermott could develop a record to support such a lopsided apportionment of settlement funds, creating more ancillary litigation and effecting the non-settling defendant's liability, without regard to its relative culpability. Another facet of the same problem arises where there are actual or potential claims between settling and non-settling defendants independent of the plaintiff's

claims. A settlement bar based upon a fairness hearing on only the plaintiff's settlement could wrongly impinge upon such claims. See, e.g., *In Re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1032-33 (2nd Cir. 1992); *F.D.I.C. v. Geldermann, Inc.*, 975 F.2d 695, 698-700 (10th Cir. 1992). The proportionate contribution mechanism, however, is necessarily specific to the matter tried – its effect reaches as far and no further than established principles of *res judicata* allow – without any additional consideration by the court or litigation by the parties.

D. The *pro tanto* credit scheme entails improper diminution in due process despite an increase in the volume of litigation.

Apart from the *pro tanto* credit scheme's facial unfairness, by turns, to plaintiffs or non-settling defendants, the requirement of ancillary fairness hearings render the scheme espoused by River Don markedly inefficient and potentially violative of due process. In comparing the efficiency or simplicity of the proportionate versus the *pro tanto* regimes, it must be recognized at the outset that, under either one, courts and juries will hear and be asked to decide whether and how much a non-settling defendant is responsible for damages relative to the plaintiff and any other potentially responsible actor, whether a settling party or not. The defense of third party liability is ubiquitous. See, Petitioner's Brief on the Merits, p. 23 n. 18. Recognizing that the two systems are on a roughly equal footing with regard to the likely complexity and length of trial, the real question becomes, which is least likely to foster ancillary litigation? The proportionate

allocation method, with its single trial resolving all relevant contribution issues between all parties best avoids the cost and uncertainty of collateral litigation. The *Self/Great Lakes Dredge* litigation, the present case, and other *pro tanto* cases cited herein, have documentated a definite tendency of the *pro tanto* scheme to increase litigation collateral to the main case. Indeed, it is acknowledged by virtually all courts, commentators, and parties that a "fairness hearing" procedure is required, if contribution litigation is to be barred by the settlement.

River Don contends that the good faith/fairness hearings can be conducted expeditiously, citing *F.D.I.C. v. Geldermann, Inc.*, 763 F.Supp. 524 (W.D. Ok. 1990) which was reversed and remanded on an interlocutory appeal because the "fairness hearing/bar order" was improperly conducted by the district court.[9] The other case cited, *TBG, Inc. v. Bendis*, 811 F.Supp. 596 (D.Kan. 1992) is rife with conclusions about potential state law claims not before the court (*Id.* at 601) and fine distinctions regarding the characterization of portions of the settlement funds (*Id.* at 608). The district court's effort to insure fairness was valiant, but clearly did not rise to the level of a judgment after trial nor did it meet the standards for summary judgment under Federal Rules of Civil Procedure, Rule 56. Nonetheless, the bar order purported to foreclose substantive claims between non-settling and settling defendants. See also *In re Masters Mates & Pilots Pension Plan*, 957 F.2d at 1033.

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[9] *F.D.I.C. v. Geldermann, Inc.*, 975 F.2d 695 (10th Cir. 1992). The bar order was held an appealable injunction under 28 U.S.C. § 1292(a)(1).

In *U.S.F. & G. v. Patriot's Point Development Authority*, 772 F.Supp. 1565 (D.S.C. 1991), the court stated:

> "One can easily envision the due process problems that might arise should a court approve a settlement as adequately reflecting a settling defendant's relative culpability, only later to learn . . . that overwhelming evidence exists showing the error of that decision."

Overwhelming evidence is not required to push such an error across the foul-line of Rule 56 and *Celotex Corp. v. Catrett*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact is sufficient. Given that quantum of damages and relative liability between the parties are ultimate factual questions rarely determinable as matters of law, such settlement approval/contribution bar rulings should be equally rare. As the Court of Appeals observed in *F.D.I.C. v. Geldermann, Inc.*, 975 F.2d at 699,

> "such [good faith settlement] confirmation procedures often tend to be abbreviated, imprecise, and lacking in the constitutional safeguards provided by a full and adversarial trial."

Moreover, the standards applied to assess "good faith/fairness" come nowhere near the level of certainty required by Rule 56 for summary adjudication of substantive claims. In *Miller v. Christopher*, 887 F.2d 902, 908 (9th Cir. 1989), the court affirmed a finding of good faith settlement, barring contribution saying:

> "Settlement amounts, however, are often discounted to reflect the cost of trial to the plaintiff and the uncertainties of the trial's outcome. Further, requiring perfect foresight on the part of

> the settling parties would not be in accordance with the agreed-upon California "grossly disproportionate" standard which finds good faith in a settlement which is in the "ballpark." [footnote and citation omitted] The district court committed no error in finding the settlement in good faith even though the amount settled on represented a discounted liability outside the range hypothesized by the court."

In no other field of the law would foreclosure of future and present claims between parties be countenanced upon a "ballpark" guess as to the ultimate disputed facts of liability and damages. Maritime law is sometimes noted for its independence from the common law and band-based principles, but the standards of due process and the Federal Rules of Civil Procedure govern on land and sea.

III. The proportionate allocation rule provides the only choice compatible with fairness and the underlying federal policies favoring settlement and comparative liability in maritime law.

> "Adoption of a proportionate fault rule would eliminate all of these problems, . . . by returning the issue of relative culpability to where it belongs, with the jury."

In re Sunrise Securities Litigation, 698 F.Supp.1256, 1260 (E.D. Pa. 1988). In the present case, McDermott and the settling sling defendants' share of liability was tried, found, and judgment rendered thereon. The hook defendants' liability for damages to the Snapper deck, only, was also determined. Nothing other than River Don's payment of the judgment needed to be done in regard to

the deck damages and the settlement. The Court of Appeals' grant to River Don of a second round of contribution from "McDermott/Sling defendants" is erroneous under any "settlement credit" scheme. McDermott prays therefore, for remand and instructions for the entry of judgment in accordance with the verdict.

CONCLUSION

Respondent makes no attempt to promote a fair rule grounded in sound policy and legal bases to account for partial settlements. Its suggestion that the non-settling defendant be granted total control of the process is transparently self-serving and promotes neither fairness, economy, deterrence of unlawful or injurious conduct, nor even the *pro tanto* method's sole strong point – arithmetic certainty. "The comparative fault rule provides a neat solution to these problems." *Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir. 1985). It is the only rule which encourages settlement by permitting parties to buy their peace on their own terms, yet forfeits nothing in fairness, deterrence, efficiency, and perhaps most notably, due process.

Wherefore, McDermott, Inc. Prays that this Honorable Court reverse the decision of the United States Court of Appeals for the Fifth Circuit, herein, and reinstate the judgment of the trial court, denying the non-settling hook

defendants dollar for dollar credit for the sling defendants' settlement.

Respectfully submitted,

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No. 92-1479

In the Supreme Court of the United States

OCTOBER TERM, 1993

MCDERMOTT, INC., PETITIONER

v.

AMCLYDE AND RIVER DON CASTINGS LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

In a tort action with multiple defendants brought under the general maritime law, whether the judgment against defendants who have not settled with the plaintiff should be reduced by the dollar amount of settlements the plaintiff reached with other defendants, or whether the judgment should be reduced by the settling defendants' proportional share of the plaintiff's damages as proved at trial.

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INTEREST OF THE UNITED STATES

This case presents an important question of federal admiralty law concerning the proper apportionment of damages in tort cases where the plaintiff has settled with some defendants but other defendants proceed to trial and judgment. The United States has a strong interest in that question because it is frequently a party to admiralty tort suits, including as a defendant in suits brought under the Suits in Admiralty Act, 46 U.S.C. App. 741-752, and the Public Vessels Act, 46 U.S.C. App. 781-790. Moreover, the United States has an interest in ensuring

that admiralty law, uniquely a subject of federal law, operates fairly and efficiently.

STATEMENT

1. This is a suit for damages to property brought under general federal maritime law. Petitioner purchased a 5000-ton marine "heavy lift" crane that was designed and manufactured by respondent AmClyde. Petitioner purchased the crane for use in moving the deck portion of an off-shore oil and gas exploration platform, which was located in the Gulf of Mexico off the coast of Texas. In order to move the deck, which weighed approximately 3950 tons, the crane was mounted on a barge situated next to the platform. As the crane lifted the deck, the equipment failed. One of the prongs on the crane's hook broke, causing one of the steel "slings" (cables) that held the deck to unravel. The deck fell and struck the barge, doing substantial damage to both the deck and the crane. Pet. App. A2-A3.

Petitioner then brought the present action in the United States District Court for the Southern District of Texas. Named as defendants in petitioner's contract and tort action were: AmClyde, the crane's designer and manufacturer; River Don, the subcontractor that manufactured the hook; the two manufacturers of the slings; and one of the sling manufacturers' suppliers. AmClyde in turn filed a cross-claim against petitioner for the cost of replacing the hook, as well as a third-party claim against Hudson Engineering, a subsidiary of petitioner that was responsible for designing the sling configuration used for the lift. Pet. App. A3.

Petitioner and the three so-called "sling defendants" (the two manufacturers and the supplier) set-

tled prior to trial for the sum of $1 million. At trial, the jury was informed that petitioner accepted responsibility for any negligence attributable to the sling defendants, Pet. App. A3, and the jury interrogatory seeking an apportionment of fault among the parties sought only a single, combined figure for petitioner and the sling defendants. Pet. App. A37. The jury returned a verdict for petitioner and awarded damages in the amount of $2.1 million. The jury apportioned responsibility for the accident as follows: petitioner and the sling defendants, 30%; respondent AmClyde, 32%; and respondent River Don, 38%. Pet. App. A4.

Respondents AmClyde and River Don requested that the $2.1 million damage award be reduced by $1 million, the amount received by petitioner in settlement from the sling defendants. The district court denied that request. The court concluded that it would be unjust for the settling defendants to pay $1 million when they were only 30% at fault, and for the non-settling defendants, who insisted on a trial and were collectively 70% at fault, to pay only $470,000. Pet. App. A52-A53. The district court therefore entered judgment against AmClyde in the amount of $672,000, which represented its 32% share of the $2.1 million verdict; and against River Don in the amount of $798,000, which represented its 38% share of the $2.1 million verdict. Pet. App. A3-A4.

2. On appeal, the court of appeals reversed the district court's allocation of damages.[1] Pet. App.

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[1] The court of appeals also concluded that petitioner's contract with respondent AmClyde precluded petitioner from

A25-A32. The court of appeals held that the district court erred in reducing the judgment against the non-settling defendants on a pro rata basis, *i.e.*, in an amount equal to petitioner's and the settling defendants' proportional share of responsibility for petitioner's damages. Although an earlier line of Fifth Circuit admiralty decisions indicated that the pro rata approach was appropriate, see, *e.g.*, *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246 (1979), a more recent line of that court's admiralty cases held that a pro tanto approach was required by Fifth Circuit law. See, *e.g.*, *Hernandez* v. *M/V RAJAAN*, 841 F.2d 582 (1988), certs. denied, 488 U.S. 981 and 488 U.S. 1030 (1989). Under the pro tanto rule, the plaintiff's damage award is reduced by the amounts recovered in settlement rather than by a figure reflecting the settling defendant's proportion of fault.[2] Pet. App. A25-A27.

In applying the pro tanto approach in this case, the court of appeals first reduced the $2.1 million jury verdict by 30%, the proportion of fault attributable to petitioner and the sling defendants. From that amount—$1.47 million—the court then deducted the gross amount of the $1 million settlement. Petitioner was thus entitled to damages of $470,000. Because River Don was the sole remaining defendant

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recovering against AmClyde in tort. Pet. App. A17-A18. Apart from its ruling on how properly to account for the settlement in allocating damages, no other aspect of the court of appeals' decision is before this Court.

[2] As a result of its decision absolving respondent AmClyde of tort liability, respondent River Don was left as the only defendant responsible for payment of any portion of petitioner's damages.

liable to petitioner in tort, the court of appeals ordered it to pay that amount to petitioner. Pet. App. A27, A29-A30. Thus, although the jury found that River Don was responsible for 38% of petitioner's $2.1 million in damages—or $798,000—its liability was limited to $470,000 as the result of petitioner's settlement with the sling defendants. Pet. App. A29-A30.

SUMMARY OF ARGUMENT

Courts and commentators have divided over the proper answer to the narrow question of federal maritime law presented in this case: How to account for a settlement when one or more defendants in a maritime tort suit enter into a settlement with the plaintiff and others choose to proceed to trial and judgment. Under the so-called pro rata approach, an amount reflecting the settling defendant's proportionate share of liability is deducted from the judgment against the remaining defendants. Under the pro tanto approach followed by the court of appeals in this case, the dollar amount of any settlement is deducted from the judgment against the non-settling defendants. We submit that the Court should adopt the pro rata approach.

A. In cases presenting questions of general maritime law, this Court has "taken the lead in formulating flexible and fair remedies in the law maritime." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). In this case, no Act of Congress or duly promulgated rule of general applicability constrains the Court's choice of the rule of decision. The Court is therefore free to follow its long-standing practice in maritime tort cases and adopt the most "just and equitable" rule under the circum-

stances. *The Schooner Catharine* v. *Dickinson*, 58 U.S. 170, 177-178 (1854).

B. The Court has already determined in *Reliable Transfer*, *supra*, that liability in maritime tort cases should be determined on the basis of comparative fault whenever possible. Consistent with comparative fault principles, the fairest and most efficient method for allocating funds paid in settlement by some, but not all, defendants in an admiralty tort case is the pro rata approach. The pro rata approach ensures that each party to a law suit—the plaintiff and each defendant—bears responsibility for the accident in proportion to its fault. The pro rata rule is both fair (because each defendant is responsible for his equitable share of the plaintiff's damages) and efficient (because it obviates the need for any ancillary proceedings to accomplish a comprehensive apportionment of damages).

Under the pro rata approach, the decision of one defendant to settle its dispute with a plaintiff has no impact on the position of any other defendant. Thus, no defendant's decision whether to settle is skewed by the decision of another defendant. And application of the pro rata rule does not alter the amount of damages a non-settling defendant will have to pay if it is found liable at trial. In contrast, under the pro tanto approach, the decision to settle made by the plaintiff and one defendant will often have a dramatic impact on the amount of damages the remaining, non-settling defendants pay if they are found liable. We see no reason why non-parties to a settlement agreement—over which they have no control—should be so affected.

C. The criticisms of the pro rata approach are unsound. Although the pro rata rule might deter a

plaintiff from entering into a settlement with one defendant out of fear that his recovery at trial will be less than it otherwise would be, that phenomenon is not unique to the multi-defendant context. Any time a plaintiff enters into a settlement, he forgoes the opportunity for a larger recovery in return for certainty and the advantages that go along with it. The fact that he will be held to his bargain should no more deter a plaintiff from settling with only one of several defendants than it might deter a plaintiff from settling with the sole defendant in a case.

The pro rata approach also preserves the plaintiff's incentives to settle if he can do so on fair terms. In this case, for example, the sum of petitioner's settlement and the remaining proportion of the judgment attributable to respondent River Don exceeded the amount that petitioner would have realized had the sling defendants litigated to judgment. Even if the converse were true, however, it would not necessarily follow that petitioner would be worse off for having settled. Because the settlement value of a case to a plaintiff represents the amount he hopes to win at trial—discounted by, among other factors, the probability of success at trial—it is wrong to equate dollars paid in settlement with dollars paid in satisfaction of a judgment. Even in cases where one party miscalculates and enters into an inadvisable settlement, there is no reason to assume that it will routinely be plaintiffs who do so. And there is, in any event, no injustice in holding that party to the terms of a bargain into which it freely entered.

D. The courts that have adopted the pro tanto approach in the admiralty setting have done so based

largely on their reading of this Court's decision in *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). That case turned, however, on the provisions of the particular statutory scheme at issue there, and should not be read as establishing generally applicable principles of maritime law.

The issue in *Edmonds* was whether a shipowner that had been found liable to an injured longshore worker was entitled to pay only its proportionate share of the worker's damages. Under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, the employee was afforded an absolute right to recover statutory benefits from his stevedoring employer, but was barred from seeking further damages from his employer in a tort suit. Thus, the worker's employer could not be held liable in tort for its share of the worker's damages, and under the common law rule of joint and several liability the shipowner was left responsible for the worker's full damages. Based on its reading of the 1972 amendments to the LHWCA, the Court concluded that the shipowner was liable for the worker's full damages, even though it was only partially responsible for the accident.

The decision in *Edmonds* was not based on the reasonableness or fairness of the result. Rather, the Court was constrained by its reading of the LHWCA and by Congress's recent decision to amend that statute without disturbing the common law rule of joint and several liability. In the present context—unlike the situation in *Edmonds*, where the Court determined that part of the statutory bargain was that the shipowner, rather than the injured party, was to bear the burden of the statutory limitation on the

liability of the stevedore—there is no sound reason not to hold both plaintiffs and defendants to the terms of their settlement bargain.

ARGUMENT

WHEN THE PLAINTIFF IN A MARITIME TORT CASE SETTLES WITH SOME, BUT NOT ALL, DEFENDANTS PRIOR TO JUDGMENT, THE JUDGMENT SHOULD BE REDUCED IN ACCORDANCE WITH THE SETTLING DEFENDANTS' PROPORTION OF FAULT, RATHER THAN BY THE DOLLAR AMOUNT OF THE SETTLEMENT

Courts and commentators have divided in answering the narrow question presented in this case—how to account for a settlement when one or more defendants in a maritime tort suit enter into a settlement with the plaintiff and others choose to proceed to trial and judgment. Under the pro rata approach, an amount reflecting the settling defendant's proportionate share of liability is deducted from the judgment against the remaining defendants. See *Leger* v. *Drilling Well Control, Inc.*, *supra*; *Associated Electric Cooperative, Inc.* v. *Mid-America Transportation Co.*, 931 F.2d 1266 (8th Cir. 1991); *Amerada Hess Corp.* v. *Owens-Corning Fiberglass Corp.*, 1993 Ala. LEXIS 485 (Ala. May 14, 1993); *Stanley* v. *Bertram-Trojan, Inc.*, 781 F. Supp. 218 (S.D.N.Y. 1991); Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 4-15, at 146 (1987 & Supp. 1989); Yeates, Dye, & Garcia, *Contribution and Indemnity in Maritime Litigation*, 30 S. Tex. L. Rev. 215, 244-249 (1989); Note, *Effect of Settlement on Apportionment of Damages in Maritime Personal Injury Cases —Is It Worth the Gamble?*, 35 Loy. L. Rev. 439

(1989). Under the pro tanto approach followed by the court of appeals in this case, the dollar amount of any settlement is deducted from the judgment against the non-settling defendants.[3] See *Hernandez* v. *M/V RAJAAN*, 841 F.2d 582 (5th Cir. 1988), certs. denied, 488 U.S. 981 and 488 U.S. 1030 (1989); *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), cert. denied, 486 U.S. 1033 (1988); Comment, *The Conflicting Doctrines of* Self *and* Leger: *The Unsettling Uncertainty of Settlement In Admiralty*, 41 Ala. L. Rev. 471 (1990).[4] We submit

[3] Courts adopting the pro tanto approach (which we do not urge) must also determine whether the non-settling defendants have a right of contribution against the settling defendant. For example, the Eleventh Circuit at first appeared to reject a right of contribution for non-settling defendants, see *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1545-1548 (1987), cert. denied, 486 U.S. 1033 (1988), but later held that contribution was appropriate. *Great Lakes Dredge & Dock Co.* v. *Tanker Robert Watt Miller*, 957 F.2d 1575, 1581 (11th Cir.), cert. denied, 113 S. Ct. 484 (1992). In our view, the manifest unfairness to non-settling defendants if they are not permitted to seek contribution under the pro tanto approach strongly militates in favor of the rule adopted in *Tanker Robert Watt Miller*. Although it is true that a settlement bar would strongly encourage settlements, that factor "cannot justify a legal rule that produces unjust results in litigation." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 408 (1975). See also note 9, *infra*.

[4] See also Restatement (Second) of Torts § 886A, comment m (1977). After describing the possible approaches, the Restatement declined to adopt any of them, on the ground that "[e]ach has its drawbacks and no one is satisfactory." *Ibid.* As we argue below (see Point B, *infra*), however, whatever

that this Court should adopt the pro rata approach.[5]

A. Under The General Maritime Law, This Court Should Adopt The Rule That Is Most "Just And Equitable" Under The Circumstances

In cases presenting questions of general maritime law, "Congress has largely left to this Court the responsibility for fashioning the controlling rules." *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 20 (1963); see also *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990). In the absence of a controlling Act of Congress, the Court has "recognized its power and responsibility," *Fitzgerald*, 374 U.S. at 20, to "take[] the lead in formulating flexible and fair remedies in the law maritime." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). In discharging that obligation in tort cases, the Court has adopted the rule of decision that "[u]nder the circumstances [is] the most just and equitable, and * * * best

"drawbacks" the pro rata approach may have are insubstantial in the present context, especially in comparison with those of a pro tanto rule.

[5] The court of appeals appears to have applied a hybrid of the pro rata and pro tanto approaches: it deducted the dollar value of the settlement from petitioner's judgment against the non-settling defendant (a pro tanto procedure), but only after first reducing the amount of the judgment by a figure reflecting the settling defendant's proportionate share of fault (a pro rata procedure). Although the court of appeals' procedure thus amounted to "double counting," that was unavoidable in light of petitioner's decision to tell the jury that it accepted responsibility for the sling defendants' share of fault, rather than seeking a jury interrogatory specifying its share of fault as well as that of the sling defendants. See Pet. App. A27.

tend[s] to induce care and vigilance on both sides, in the navigation." *The Schooner Catharine* v. *Dickinson*, 58 U.S. 170, 177 (1854); see also *Reliable Transfer*, 421 U.S. at 402-403. In the present case, it is undisputed that no Act of Congress or duly promulgated rule of general applicability constrains the Court's choice of the rule of decision that is most "just and equitable" under the circumstances.[6]

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[6] Although Congress has not spoken to the question presented here, it has generally favored comparative negligence principles in allocating maritime liability, see, *e.g.*, Jones Act, 46 U.S.C. 688; Death on the High Seas Act, 46 U.S.C. 766—at least where there has been no policy judgment that workers are entitled to payment for every injury in return for a reduced amount of benefits. See Longshore and Habor Workers' Compensation Act, 33 U.S.C. 901; *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). Moreover, in Section 122(g)(5) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9622(g)(5), Congress provided that payments made by one responsible party in settlement of liability under that statute "reduce[] the potential liability of [other responsible parties] by the amount of the settlement." In that context, Congress made the judgment that the statutory objective of fully funding the actual costs of environmental clean-up projects was paramount.

In other contexts, as in maritime cases, the federal courts have generally divided on whether a pro rata or pro tanto apportionment is preferable. See, *e.g.*, *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (adopting pro rata approach in securities litigation); *Singer* v. *Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989) (adopting pro tanto approach in securities litigation). See also *Texas Industries* v. *Radcliff Materials*, 451 U.S. 630 (1981) (no implied right to contribution among co-conspirators under the antitrust laws); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 (1981) (no implied right to contribution under Title VII of the Civil Rights Act of 1964).

Although no Act of Congress or decision of this Court is controlling here, the Court has established principles that point to an appropriate disposition of this case. Specifically, the Court has recognized that principles of comparative fault generally should be utilized in assessing tort damages in admiralty cases. In *Reliable Transfer*, the Court was faced with the question whether to abandon the venerable common law admiralty rule of divided damages. Under that rule, so long as both parties to a collision between vessels were partially at fault, both were responsible for one-half of the resulting damages, regardless of the parties' relative degrees of fault.[7] Concluding that the rule of divided damages "produces palpably unfair results" in every case where each party was not equally at fault, the Court abandoned that rule in favor of a system of comparative fault, under which each party is responsible for damages in proportion to its degree of fault. 421 U.S. at 405. Rejecting the rule of divided damages, the Court concluded, would not unduly deter settlements, because "[e]xperience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements." *Id.* at 408. Thus, the Court held that liability for

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[7] The rule of divided damages was a longstanding doctrine that originally was applicable only in collision cases. See *Reliable Transfer*, 421 U.S. at 400 n.1 (quoting *The Sapphire*, 85 U.S. 51, 56 (1873), and *The North Star*, 106 U.S. 17, 22 (1882). As the Court noted in *Reliable Transfer*, however, the rule had been extended to all cases in which a vessel had been damaged, regardless of whether the damage was caused by collision with another vessel. *Ibid.*; see also G. Gilmore & C. Black, *The Law of Admiralty* § 7-17, at 522-523 (2d ed. 1975).

damages in admiralty tort cases should be "allocate[d] * * * according to comparative fault whenever possible," in order best to achieve a "just and equitable" division of damages among tortfeasors. *Id.* at 411.[8]

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[8] In determining how best to apportion liability among maritime defendants, this Court has adopted what it finds to be the most equitable and efficient rule, without reference to state law. See *United States* v. *Reliable Transfer, supra*; *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974). To the extent, however, that the general tort law of the States is relevant, see *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990); *Moragne* v. *States Marine Lines, Inc.*, 398 375 (1970), that body of law is divided.

Consistent with Section 6 of the Uniform Comparative Fault Act (1977), a number of States have adopted, either through statute or common law, a rule reducing the plaintiff's award by an amount reflecting the settling defendant's equitable share of the plaintiff's damages. See Colo. Rev. Stat. Ann. § 13.50.5.105(a) (West 1992); Conn. Gen. Stat. Ann. § 52.572h(n) (West 1991); Iowa Code Ann. § 668.7 (West 1987); Ky. Rev. Stat. Ann. § 411.182(4) (Michie/Bobbs Merrill 1992); La. Civ. Code Ann. art. 1803 comment (b) (West 1992); *Frederickson* v. *Alton M. Johnson Co.*, 402 N.W.2d 794, 797 (Minn. 1987) (en banc) (but see Minn. Stat. Ann. § 604.01 (West 1988) (previously adopting contrary rule)); Neb. Rev. Stat. § 25-21,185 (1989); *Young* v. *Latta*, 589 A.2d 1020, 1024 (N.J. 1991); New Mexico Stat. Ann. § 41.3A.1 (Michie 1978); Utah Code Ann. § 78.27.40 (1992); *Peiffer* v. *Allstate Insurance Co.*, 187 N.W.2d 182, 185 (Wis. 1971).

On the other hand, a larger number of States have adopted, again by statute or common law, the pro tanto approach of Section 4 of the Uniform Contribution Among Tortfeasors Act (1955). See *John Crane-Houdaille, Inc.* v. *Lucas*, 534 So.2d 1070, 1073 (Ala. 1988); Ariz. Rev. Stat. Ann. § 12.2504 (1992); Ark. Code Ann. § 16.61-204 (Michie 1987); Cal. Civ. Proc. Code § 876 (West 1980); Del. Code Ann. tit. 10, § 6304

B. The Pro Rata Approach Is The Fairest And Most Efficient Method For Allocating Damages When Some, But Not All, Defendants Settle In A Maritime Tort Case

In *Leger* v. *Drilling Well Control, Inc.*, *supra*, the Fifth Circuit recognized that "[t]he reasoning of

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(1975); Fla. Stat. Ann. § 768.31(5) (West 1986); *Hendricks* v. *Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1508 (11th Cir. 1985) (interpreting Georgia law); *King Cotton, Ltd.* v. *Powers*, 409 S.E.2d 67 (Ga. App.), cert. granted, 1991 Ga. LEXIS 884 (Ga. 1991); Haw. Rev. Stat. § 663.14 (1988); Idaho Code § 6.805 (1989); Ill. Ann. Stat. ch. 740, para. 100/2(c) (Smith-Hurd 1993); *Indiana State Highway Commission* v. *Morris*, 528 N.E.2d 468, 473 (Ind. 1988); Kan. Civ. Proc. Code Ann. § 60-258a (Vernon 1983); Maine Rev. Stat. Ann. tit. 14, § 163 (West 1980); Md. Ann. Code art. 50, § 19 (1992); Mass. Ann. Laws ch. 231B, § 4 (Law. Co-op. 1992); Mich. Comp. Laws. Ann. § 27A.2925(4) (West 1981); Mo. Ann. Stat. § 537.060 (Vernon 1991); *Kuhnke* v. *Fisher*, 740 P.2d 625, 629-630 (Mont. 1987); Nev. Rev. Stat. Ann. § 41.141 (Michie 1986); N.H. Rev. Stat. Ann. § 507:7-b (1983); N.C. Gen. Stat. § 1B.4 (1992); N.D. Cent. Code § 32.38.04 (1976); *Schneider* v. *Warren*, 500 N.E.2d 356, 358 (Ohio App. 1985); Okla. Stat. Ann. tit. 12, § 832(H) (West 1988); Or. Rev. Stat. Ann. § 18.455 (1988); Pa. Stat. Ann. tit. 42, § 8326 (1992); R.I. Gen. Laws § 10.6.7 (1992); S.C. Code Ann. § 15.38-50 (Law. Co-op 1992); S.D. Codified Laws Ann. § 15.8.17 (1984); Tenn. Code Ann. § 29.11-105 (1992); Tex. Rev. Civ. Stat. Ann. art. 2, § 33.012 (West 1993); Va. Code Ann. § 8.01-35.1(A)(1) (Michie 1992); Wash. Rev. Code Ann. § 4.22.606 (West 1988); *Kodym* v. *Frazier*, 412 S.E.2d 219 (W. Va. 1991). Several of these States, however, do not follow a comparative fault system for determining liability in the first instance. See *Knight* v. *Alabama Power Co.*, 580 So.2d 576 (Ala. 1991); *Board of Trustees* v. *RTKL Assocs., Inc.*, 559 A.2d 805, 810 (Md. Ct. Spec. App. 1989); *Dunbar* v. *City of Lumberton*, 414 S.E.2d 387 (N.C. App. 1992); *Litchford* v. *Hancock*, 352 S.E.2d 335, 337 (Va. 1987); see also *McIntyre* v. *Ballentine*, 833 S.W.2d 52 (Tenn. 1992) (aban-

Reliable Transfer loses none of its cogency * * * simply because one or more of the potential defendants has settled with the injured party." 592 F.2d at 1249. Consistent with the comparative fault principles adopted in *Reliable Transfer*, then, the fairest and most efficient method for taking account of funds paid in settlement by some, but not all, defendants in an admiralty tort case is the pro rata approach.

The pro rata approach assures that each joint tortfeasor is held responsible for the share of the plaintiff's damages it caused—no more and no less. Because each defendant can be exposed to no more than its proportionate share of the plaintiff's damages, non-settling defendants will have no occasion to seek contribution from the settling defendants.[9] Nor will

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doning contributory negligence system in favor of modified comparative fault system); *Nelson* v. *Concrete Supply Co.*, 399 S.E.2d 783 (S.C. 1991) (same).

Two States have adopted a hybrid approach. Mississippi uses the pro rata approach only if the settling tortfeasor has paid less than its equitable share of the plaintiff's damages. Miss. Code Ann. § 85-5-1 (1973). New York reduces the plaintiff's award by the dollar amount of the settlement or the settling tortfeasor's proportion of liability, whichever is greater. N.Y. Gen. Oblig. Law § 15-108 (McKinney 1993). Finally, neither Alaska nor Vermont appears to have adopted a particular approach.

[9] One version of the pro tanto approach—under which the settling defendant receives a release from the plaintiff and the non-settling defendants have no right of contribution—also makes further litigation over contribution unnecessary. As we have noted (see note 3, *supra*), however, it does so at the price of manifest unfairness to non-settling defendants, who will be forced to "bear the risk that the plaintiff settled for too little." *Great Lakes Dredge & Dock Co.* v. *Tanker Robert Watt Miller*, 957 F.2d 1575, 1582 (11th Cir. 1992).

non-settling defendants have any incentive to question the good faith or reasonableness of a settlement entered into by the plaintiff and other defendants.[10] In short, the pro rata approach is both fair (because each defendant is responsible for his equitable share of the plaintiff's damages) and efficient (because it obviates the need for any ancillary proceedings to accomplish a comprehensive apportionment of damages).

The rule we advocate is efficient for another reason as well: It preserves the incentives of parties to settle their disputes. Under the pro rata approach, the normal incentives in favor of settlement are preserved. Defendants have an interest in reaching a settlement with the plaintiff because they are assured that any settlement will close the matter. There is no danger that they will be forced to defend actions for contribution or respond to allegations that the settlement was unreasonable or collusive.[11] Under the pro tanto approach, by contrast, a defendant would often be deterred from entering into a settle-

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[10] Because of the danger of collusion, it is generally recognized that the pro tanto approach (without contribution) requires that settlements be entered into in good faith. See Restatement (Second) of Torts § 886A, comment m. As a result, any efficiency gain derived from barring an action for contribution would be offset by the potential for litigation over the *bona fides* of the settlement. See *Tanker Robert Watt Miller*, 957 F.2d at 1582.

[11] Non-settling defendants, however, will still face the possibility of further litigation in actions for contribution among themselves, see *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), thus providing a further incentive to settle.

ment because of the distinct likelihood that it will be subject to a future action for contribution.

In sum, under the pro rata approach, the decision of one defendant to settle its dispute with a plaintiff has no impact on the position of any other defendant. The pro rata approach does not skew the non-settling defendant's decision whether to settle. And it does not affect the amount of damages a non-settling defendant will have to pay if it is found liable at trial. In contrast, under the pro tanto approach, the decision to settle made by the plaintiff and one defendant will often have a dramatic impact on the amount of damages the remaining, non-settling defendants must pay if they are found liable. In this case, for example, the court of appeals' decision reduced respondent River Don's liability to petitioner from $798,000 to $470,000—solely as the result of a settlement agreement that it had no part in negotiating and to which it was not a party.[12] In our view, that result makes little sense, especially in comparison with the pro rata approach, which appropriately places the benefits and burdens of a settlement on the parties to it.

C. The Criticisms Of The Pro Rata Approach Are Unsound In This Setting

1. The pro rata approach has been criticized on two grounds. First, it is said to "work[] strongly

[12] Under the court of appeals' holding, the dollar amount of petitioner's recovery would total $1.47 million (the sum of the sling defendants' settlement and River Don's $470,000 liability). Under the pro rata approach we urge, petitioners recovery would total $1.798 million (the sum of the sling defendants' settlement and River Don's share of the $2.1 million jury verdict.)

against the interest of the injured party and [to] have the effect of discouraging him from entering into a settlement." Restatement (Second) of Torts § 886A, comment m (1977). Second, the pro rata approach is said to interfere with the plaintiff's entitlement "to receive a full damage award less any amount he recovered in a settlement." *Hernandez* v. *M/V RAJAAN*, 841 F.2d 582, 591 (5th Cir. 1988), certs. denied, 488 U.S. 981 and 488 U.S. 1030 (1989); see also *Constructores Tecnicos* v. *Sea-Land Serv., Inc.*, 945 F.2d 841, 850 (5th Cir. 1991) (plaintiff not entitled to "recover more than the damages determined at trial"). Neither criticism, in our view, is sound.

Although it is true in theory that the pro rata approach might deter a plaintiff from entering into a settlement with one defendant out of fear that his recovery at trial will be less than it otherwise would be, we fail to see why that phenomenon is unique to the multi-defendant context. As one court has observed, "[a] plaintiff considering settlement must always consider the possibility that settlement will yield less than litigating a cause to completion." *Stanley* v. *Bertram-Trojan, Inc.*, 781 F. Supp. 218, 224 (S.D.N.Y. 1991). Any time a plaintiff enters into a settlement, he forgoes the opportunity for a larger recovery in return for certainty and the advantages that go along with it.[13] The fact that he will be held

[13] The decision to settle is controlled by a variety of factors that must be considered by both the plantiff and the defendant—including the amount of an expected judgment if the case goes to trial, the probability of success at trial or on appeal, the costs of litigating to judgment, the costs of settlement, and the parties' relative risk averseness. See Richard A. Posner, *Economic Analysis of Law* § 21.5, at 554-560 (4th ed. 1992).

to his bargain—including its benefits and detriments—should no more deter a plaintiff from settling with only one of several defendants than it might deter a plaintiff from settling with the sole defendant in a case. In either situation, the plaintiff is free to settle or not, in the exercise of his best judgment.

Moreover, the pro rata approach gives the plaintiff an incentive to settle if he believes he can do so on favorable terms. As things turned out at the trial in this case, the $1 million settlement petitioner reached with the sling defendants exceeded the proportion of the $2.1 million jury verdict for which those defendants might have been found responsible had they litigated to judgment.[14] In other words, the sum of petitioner's settlement and the remaining proportion of the judgment attributable to River Don exceeded the amount that petitioner would have realized had the sling defendants litigated to judgment. Petitioner thus apparently was able to negotiate a disproportionately favorable settlement with the sling defendants, and of course had every incentive to do so.

Even if a plaintiff is unable to secure a settlement that disproportionately rewards him, however, he nonetheless has every incentive to reach a fair settlement with any defendant. Under the pro rata approach, regardless of the terms of a settlement, a plaintiff who succeeds at trial is assured of a recovery from each defendant in proportion to that

[14] The jury aggregated the degree of fault attributable to petitioner and the sling defendants, and reached a figure of 30%. See Pet. App. A35. Thus, according to the jury's verdict, the maximum amount sling defendants would have been found liable for if they had not settled was $630,000 (30% of the $2.1 million verdict).

defendant's share of fault. See *Leger*, 592 F.2d at 1250. Thus, the plaintiff can be worse off for settling only if the value of the share of the judgment that is attributable to the settling defendant exceeds the amount of the settlement he has reached with that defendant.

Further, it is overly simplistic to view every plaintiff in such circumstances as "worse off," because it is erroneous to equate dollars paid in settlement with dollars paid in satisfaction of a judgment. Because the settlement value of a case to a plaintiff represents the amount he hopes to win at trial—discounted by, among other factors, the probability of success at trial—it is by no means clear that the plaintiff who realizes less in absolute dollars in a settlement than he would have realized at trial has made a bad deal. See Richard A. Posner, *supra*, at § 21.5, pp. 554-560. The plaintiff has traded his chance for a larger recovery against that defendant in return for a certain recovery without the costs of litigation.

The same is true from the perspective of the settling defendant. As the Fifth Circuit recognized in *Leger*, "[a]ny amounts received in settlement are discounted both by plaintiff and defendant to take into account the risks and rewards of going to trial." 592 F.2d at 1250 n.10. Thus, while in hindsight it might appear in this case that the sling defendants settled with petitioner on unfavorable terms, that is not at all clear from a pre-trial perspective. Before trial, any number of factors could have led the sling defendants to decide that the settlement here was in their interest: They might have overestimated the amount of petitioner's damages or their share of responsibility for the accident, as compared with what the jury ultimately determined; or they might

have determined that the costs of trying the case and any subsequent appeals made it more economical to settle; or they might simply have been highly risk averse. In any event, the result at trial—although perhaps other than what the sling defendants anticipated—gave them no cause for complaint.[15]

Thus, there should be nothing troubling about the possibility that a plaintiff who makes a favorable settlement might be "paid for more than its injury," Pet. App. A27. See also *Associated Electric Cooperative, Inc.*, 931 F.2d at 1271. As we have noted, that may or may not be the case, depending on the relative economic judgments made by the parties to the settlement when they entered into it. Moreover, even granting that the parties to a settlement sometimes miscalculate its value, there is no reason to assume that plaintiffs or defendants will more often be the parties who err. "Because some settlements are more favorable than others," *ibid.*, it will frequently be the case that plaintiffs realize more or less from a settlement than the damages they would have received if they had gone to trial against all defendants. In either event, the result is simply the product of a bargain into which both parties freely entered.

2. Furthermore, the weaknesses in the pro tanto approach outweigh whatever force the criticisms of the pro rata rule might reasonably be thought to have. First, the pro tanto approach is "potentially

[15] Because the parties to a settlement should be held to their bargain, under the pro rata approach a defendant whose settlement represents a disproportionate share of the plaintiff's damages as proven at trial should not be entitled to indemnity or contribution from its co-defendants, absent an agreement among them to the contrary. See Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 4-15, at 154 n. 52 (1987 & Supp. 1989).

unfair to all of the involved parties." Thomas J. Schoenbaun, *supra* § 4-15, at 24 (Supp. 1989). It is unfair to the non-settling defendant, who bears the risk that the plaintiff settled with other defendants for less than their proportionate share of liability—although that unfairness concededly is mitigated if the non-settling defendant retains a right of contribution. And in circumstances such as those in the present case, it is unfair to the plaintiff, who is forced to transfer the benefit of his bargain with the settling defendants to the non-settling defendants. Finally, it is unfair to a settling defendant, if it is unable to secure a release from all liability because of the possibility of an action for contribution.

Moreover, the pro tanto rule discourages settlements, at least insofar as non-settling defendants have a right of contribution. A defendant has no incentive to settle with the plaintiff if it cannot cut off its liabilty—unless the defendant is willing to pay in settlement *more* than its proportionate share of the plaintiff's actual damages without discounting for the possibility of success at trial. On the other hand, if there is no right of contribution under the pro tanto approach, defendants will have a strong incentive to race to settle in order to avoid the risk of being burdened with a disproportionate share of the plaintiff's damages at trial. As this Court observed in *Reliable Transfer*, 421 U.S. at 408, however, there is no reason to follow a rule of law if its only virtue is to "yield[] quick, though inequitable, settlements."

Finally, the pro tanto approach has the potential to reward defendants for refusing to settle. In this case, for example, respondent River Don made a

deliberate decision to litigate to judgment rather than settle what the jury found to be a meritorious claim against it. Under the court of appeals' decision. River Don's refusal to settle paid off handsomely. Even though the jury found River Don to be responsible for $798,000 of petitioner's $2.1 million in damages, the pro tanto rule reduced its liability to $470,000—for no reason other than that petitioner was able to secure a large settlement from other defendants. Rather than permitting River Don thus to "benefit substantially from its intransigence or miscalculation in refusing to settle the case," the better rule would be to require each party "to accept whatever benefits or burdens flow from its decision" to settle or litigate. *Leger*, 592 F.2d at 1251. That better rule is the pro rata approach.

D. This Court's Decision In *Edmonds* v. *Compagnie Generale Transatlantique* Does Not Undermine The Pro Rata Rule

Courts that have declined to follow the pro rata approach in the admiralty setting have done so based largely on their reading of this Court's decision in *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). See, *e.g.*, *Myers* v. *Griffin-Alexander Drilling Co.*, 910 F.2d 1252, 1256 (5th Cir. 1990); *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1546 (11th Cir. 1987); see also *Joia* v. *Jo-Ja Service Corp.*, 817 F.2d 908, 914-917 (1st Cir. 1987), cert. denied, 484 U.S. 1008 (1988). In our view, however, *Edmonds* turned on the provisions of the particular statutory scheme at issue there, and should not be read as establishing generally applicable principles of maritime law. See *Associated Electrical Cooperative*, 931 F.2d at 1270-1271.

In *Edmonds*, a longshoreman was injured on a ship. He recovered worker's compensation benefits from his stevedore employer under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, which afforded him an absolute right to recover statutory benefits but barred him from seeking further damages from his employer in a tort suit.[16] In his later tort action against the shipowner, the jury apportioned 10% of the fault for the accident to the longshoreman, 20% to the shipowner, and 70% to the stevedore/employer. Under the venerable common law rule of joint and several liability, after the award was reduced by the longshore-

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[16] Under the LHWCA, the employee's exclusive remedy against his employer was that Act's benefits system. See *Edmonds*, 443 U.S. at 260-261. Prior to the 1972 amendments to the LHWCA, this Court had held that a longshoreman was entitled to a warranty of seaworthiness from the shipowner, "which amounted to liability without fault for most onboard injuries." *Id.* at 261 (citing *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 94 (1946)). The Court had further held that the shipowner could not circumvent the exclusiveness of the LHWCA remedy as against the longshoreman's employer by seeking contribution from the employer. See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952). The Court had also held, however, that the shipowner and stevedore could contractually agree that the latter would indemnify the shipowner for amounts paid to an employee as a result of the stevedore's breach of a warranty of workmanlike service. See *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956). In 1972 Congress amended the LHWCA to make clear that the shipowner could not be held liable for a longshoreman's injuries without fault, and that the stevedore/employer could not even agree to indemnify the shipowner for his liability. See *Edmonds*, 443 U.S. at 262.

man's 10% fault, the shipowner was left responsible for payment of the remaining 90% of the damages. The shipowner, however, sought to pay the injured longshoreman only its proportionate share of damages.

This Court held that the shipowner was liable for the full amount of the damages awarded to the longshoreman. In 1972, Congress had amended Section 905(b) of the LHWCA to provide that a longshoreman could not recover damages from a shipowner in the absence of fault on the latter's part, and that the longshoreman's employer could not be held directly or indirectly responsible for damages in excess of the statutory benefits. See 33 U.S.C. 905(b); *Edmonds*, 443 U.S. at 262-263. It was against this backdrop that the shipowner sought to have the Court reject the principle of joint and several liability in favor of a system of comparative fault. Because the stevedore/employer was statutorily shielded from further payments to the plaintiff, the issue in *Edmonds* was whether the shipowner or the injured longshoreman would bear the burden of the employer's negligence.

Although the Court in *Edmonds* "acknowledged the sound arguments supporting division of damages between parties before the court on the basis of their comparative fault," 443 U.S. at 271 (citing *Reliable Transfer, supra*), it concluded that it was "not as free as [it] would otherwise be to change" the law in the circumstances of that case.[17] "By now changing what * * * Congress understood to be the law" when it amended the LHWCA—and what Congress

[17] The Court first concluded that the 1972 amendments did not themselves modify the rule of joint and several liability. See *Edmonds*, 443 U.S. at 263-271.

"did not itself wish to modify"—the Court concluded that it "might knock out of kilter th[e] delicate balance" between the rights of longshore workers, stevedores and shipowners that had been drawn in the statute. 443 U.S. at 273.

In our view, *Edmonds* is inapposite in this case. Under the LHWCA regime at issue in *Edmonds*, Congress chose to subject the stevedore to absolute liability in return for limiting the benefits payable to the employee and exempting the stevedore from further liability. See 443 U.S. at 261. Moreover, neither the injured party nor the stevedore is permitted under the LHWCA to bargain over the terms of the stevedore's liability to its employee. Outside that context, however, the injured party *is* free to sue any alleged tortfeasors and *is* free to strike the best settlement bargain with them that he can. See *Associated Electric Cooperative*, 931 F.2d at 1271; *Tanker Robert Watt Miller*, 957 F.2d at 1580 n.4. Thus, unlike in the LHWCA context—where the Court determined in *Edmonds* that part of the statutory bargain was that the shipowner, rather than the injured party, was to bear the burden of the statutory limitation on the liability of the stevedore—there is no sound reason as a general matter not to hold both plaintiffs and defendants to the terms of their settlement bargain.

As Justice Blackmun noted in dissent in *Edmonds*, the Court's decision did not rest "on grounds of reason or fairness." *Edmonds*, 443 U.S. at 274 (Blackmun, J., dissenting). In this case, however, where no action by Congress requires the Court to "stay [its] hand," *Edmonds*, 443 U.S. at 273, the Court is free to adopt the rule that makes the most sense. As the Court acknowledged in *Edmonds*,

weighty policy reasons "support[] divi[ding] damages between parties before the court on the basis of their comparative fault." 443 U.S. at 271. *Edmonds* is thus entirely consistent with the Court's conclusion in *Reliable Transfer* that the most "just and equitable" system for allocating damages in maritime cases is in accordance with principles of comparative fault. See *Reliable Transfer*, 421 U.S. at 411. In this case, if no defendant had settled with petitioner, the damages would have been allocated on a proportional basis. That result should not change "simply because one or more of the potential defendants has settled with the injured party." 592 F.2d 1249.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 92-1479

In The
Supreme Court of the United States
October Term, 1992

McDERMOTT, INC.,
Petitioner,

v.

AMCLYDE, A DIVISION OF AMCA INTERNATIONAL, INC. AND
RIVER DON CASTINGS, LTD.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, SUGGESTING REVERSAL

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Dated: August 20, 1993

QUESTIONS OF LAW PRESENTED

1. How should a plaintiff's settlement with one defendant be accounted for in entering judgment against other defendants?

2. Should either settling or non-settling defendants be permitted to seek contribution from the other?

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, SUGGESTING REVERSAL

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* suggesting reversal of the decision below of the Court of Appeals. Both Petitioner and Respondent have consented to MLA's participation, and copies of the letters conveying such consent are being filed with the Clerk of the Court simultaneously with the submission of this brief.

INTEREST OF *AMICUS CURIAE*

MLA has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899.

It has a membership of about 3600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests--shipowners, charterers, cargo owners, shippers, forwarders, port authorities, stevedores, seamen, longshoremen, passengers, marine insurance brokers and underwriters and other maritime plaintiffs and defendants.

MLA's purposes are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives MLA, during the ninety-four years of its existence, has sponsored a wide range of legislation dealing with maritime matters, including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

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[1] 46 U.S.C. §§ 1300-1315 (1988).

[2] 9 U.S.C.A. §§ 1-16 (West Supp. 1993).

[3] *E.g.*, 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376 (1988); implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 3-4 (7th rev'd ed. 1993), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 161 (1992); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073 (1988).

MLA's Committee on Maritime Personnel appointed a subcommittee in 1988 to study the conflicting methods employed by federal courts in reducing judgments entered against one defendant to account for settlements reached by the plaintiff with other defendants. That subcommittee represented the views of both plaintiffs and defendants. It submitted a report in the spring of 1990, endorsed by its parent committee, which recommended a set of rules which, for the most part, track the provisions of the Uniform Comparative Fault Act, 12 U.L.A. 43 (Supp. 1993) ("UCFA"). Subsequently, a resolution was unanimously adopted at MLA's Annual Spring Meeting on May 4, 1990, authorizing MLA sponsorship of legislation which would codify those rules.[4] As a result of MLA's further efforts, the Hon. Helen Delich Bentley introduced draft legislation on September 12, 1991. H.R. 3318, 102d Cong. 1st Sess. (1991). A copy of that Bill, referred to hereafter as "the MLA Bill," is reproduced in the appendix to this brief.[5] MLA sought passage of that Bill to obtain uniformity in this area of maritime law.

The quest for uniformity in maritime law has long been of great importance to MLA. It has been repeatedly expressed by our membership and standing committees. For example, in 1975 MLA's Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be taken to persuade con-

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[4] MLA Minutes, MLA Doc. No. 683 at 9625-28 (1990).

[5] The Bill died in the House Judiciary Committee at the end of the last term. MLA is currently working with members and staff of that Committee with a view to reintroducing the Bill this term. Of course, the opinion in this case will likely have an impact on the need for the Bill, and thus further legislative action will probably await that opinion.

gressional committees "that nationwide and, in fact, worldwide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at MLA's Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by MLA on several occasions, most recently in a 1986 resolution.[7]

It is the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law and the future course of maritime litigation generally. Such a situation exists in this case. Application of differing rules related to settlements by one joint tortfeasor in maritime cases not only destroys uniformity of U.S. maritime law but also invites and endorses forum shopping and unpredictability in an area in which consistency is essential. Allowing a proliferation of chaotically different results in the same factual settings adversely affects the general viability of the doctrine of uniformity and consequently the practices of MLA's attorney members and the affairs of their clients.

MLA also has a strong interest in having substantive rules developed which promote admiralty's historic goal of equity. The rules set out in the MLA Bill are designed to be nonpartisan,[8] to furnish all maritime litigants with certainty

[6] MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

[7] MLA Minutes, MLA Doc. No. 669 at 8769 (1986). This Court has often expressed the same philosophy. *See, e.g., Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875). *See also* Henry M. Hart, Jr., *The Supreme Court, 1958 Term*, 73 Harv. L. Rev. 84, 148 (1959).

[8] *See* Paul S. Edelman, *The Federal Maritime Comparative Responsibility Act*, N.Y.L.J., Nov. 1, 1991, at 3. Mr. Edelman was the plaintiff representative on the MLA subcommittee which drafted the bill.

respecting the mechanics of a settlement credit and to provide the judiciary with a workable solution to these difficult issues. Accordingly, MLA's Executive Committee voted, without dissent, to submit this brief, not in support of either party, but in support of adoption by this Honorable Court of certain principles contained in the MLA Bill.[9] Adoption of those rules would require reversal of the opinion below.

SUMMARY OF ARGUMENT

When a plaintiff settles with one defendant and then proceeds to trial against others, some adjustment to account for the settlement must be made when entering judgment. Some courts, including the Court of Appeals below, have reduced the judgment by the dollar amount of the settlement. This is generally referred to as a *pro tanto* credit. Other courts have reduced the judgment by that percentage of the overall damages which equals the settling defendant's proportionate fault in causing the loss. This will be referred to herein as a "proportionate credit."[10]

[9] The case before the Court is a property damage case, to which the MLA Bill would not have applied *ex proprio vigore*. Maritime property damage litigation may involve complications or legal principles not typically encountered in personal injury claims. The impact here of McDermott's contract with AmClyde is an example of such a complication. Because settlement credit problems appeared to arise far more frequently in personal injury litigation, MLA decided to limit the scope of the MLA Bill to those cases. Identical credits have been applied to property damage claims, however, and the reasons for selecting a proportionate credit, discussed *infra*, would seem to apply equally to property damage. MLA's decision to submit this brief is based at least in part on concern that the rules announced in this case will be applied by lower courts in future personal injury litigation.

[10] Some courts have referred to such a proportionate reduction as a "*pro rata*" credit. MLA has consciously avoided use of that term to avoid confusion with "*pro rata*" credits applied in some states which reduce awards based on the numbers of settling and non-settling defendants.

Although no solution is perfect under all circumstances, the proportionate credit is superior in most respects. It is fair to all the litigants, because the parties to the settlement keep the benefit of their bargain and the non-settling defendants remain liable for that percentage of the plaintiff's damages caused by their own proportionate fault. Settlement is encouraged, because each defendant is able to weigh the extent of its own liability without regard to the impact of another party's settlement. Since the adequacy of settlements does not have to be determined, ancillary litigation is avoided. And a proportionate credit fully comports with the trend in maritime law towards pure comparative fault.

The proportionate credit also eliminates the need for contribution claims between settling and non-settling parties in most situations,[11] because the non-settling defendants pay their share of the plaintiff's loss, and not any part of the shares of settled defendants. Adoption of a *pro tanto* credit, however, would require the Court to examine contribution rights, since a maritime defendant paying more than its share of the plaintiff's recovery may generally seek contribution from a joint tortfeasor which has paid less than its share. Thus, contribution problems will be avoided, and equity and judicial economy will be promoted, by adoption of a proportionate settlement credit.

This case presents another opportunity for this Court to carry out its constitutionally mandated function of formulating admiralty and maritime guidelines in a way which will fairly encourage compromise and enable lower courts to adjudicate harmoniously the rights and liabilities of non-settling parties.

For example, if one defendant settled and two others were held liable at trial, such a "*pro rata*" credit would be one-third of the award, without regard to the amount paid in settlement or the relative culpability of the tortfeasors.

[11] A single exception is described in note 13, *infra*.

ARGUMENT

I.
INTRODUCTION

While other variations are possible, courts applying settlement credits in the maritime context have typically followed either the formulation set out in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), or that announced in *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988). *Leger* adopted the proportionate credit, under which non-settling defendants received a credit for that portion of the plaintiff's damages caused by the fault of the settling defendants. Stated conversely, the non-settling defendants in *Leger* were liable for that part of the plaintiff's loss caused by their combined negligence. *Self*, on the other hand, opted for a dollar-for-dollar or *pro tanto* credit, to be applied regardless of the proportionate fault of the settling and non-settling defendants.[12] The MLA Bill proposes a proportionate credit in accord with *Leger*.

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[12] The following hypothetical illustrates the problem now before the Court. Plaintiff ("P") brings an action against defendants A, B and C. P settles with A before trial for $25,000. At trial, fault is found in the following percentages:

P: 10%
A: 20%
B: 30%
C: 40%

P's damages are assessed at $100,000. How is the Court to account for P's settlement with A in entering judgment against B and C?

Under any credit, P would absorb 10% of the loss on account of his own contributory negligence. A *Leger* credit would be for A's 20% share of P's damages and would result in judgment being entered jointly and severally against B and C for $70,000, their combined 70% share of P's damages. Under *Self*, P's damages would be reduced first by his own

II.

THE AVAILABILITY OF CONTRIBUTION MUST BE CONSIDERED WHEN SELECTING A SETTLEMENT CREDIT MECHANISM

This case, in theory, presents only the question of how to calculate the amount of the credit to non-settling tortfeasors.[13]

10% fault and then by the $25,000 settlement. Thus, judgment would be entered against B and C jointly and severally for $65,000.

This example represents a favorable settlement by P. If P had received only $15,000 in settlement from A, under the same fault allocation the *Leger* credit would remain unchanged. Under *Self*, however, the judgment against B and C would be $75,000. This would represent an unfavorable settlement by P.

[13] The MLA Bill addresses the full range of problems associated with multi-party personal injury litigation which the Commissioners on Uniform State Laws had considered while creating the UCFA in 1977. Maritime scholars have advocated reference by admiralty courts to this draft legislation. *See* David R. Owen and J. Marks Moore, III, *Comparative Negligence in Maritime Personal Injury Cases*, 43 La. L. Rev. 941, 959 (1983).

The UCFA contained some provisions already well established in maritime law, such as proportionate reduction of the plaintiff's damages on account of contributory negligence. In addition to a proportionate settlement credit, the UCFA also precluded contribution in most circumstances. Contribution is permitted only when one defendant settles the plaintiff's entire claim, thereby buying the other defendants peace for a fair price. Finally, the UCFA offered rules for dealing with insurance offsets and non-paying defendants. The latter rule, known as "reallocation," appears in § 3(d) of the MLA Bill. The House Judiciary Committee has raised some concern about the inclusion of reallocation in the bill, due largely to its partisan impact, and its legislative future is uncertain. For that reason, and because reallocation is not before the Court, MLA is not now urging the Court to adopt, or to reject, the principles of § 3(d) of the MLA Bill. Indeed, MLA believes that the Court need not and should not address the issue in deciding this case. Debate over reallocation should properly await another day in another forum, when MLA's constituent member groups would be free to urge adoption of their respective positions.

That determination, however, is closely related to the rules governing contribution, also dealt with by the MLA Bill, § 5. Because the fairness of *pro tanto* and proportionate credits depends in part on the availability of contribution, and because the availability of contribution will always be an issue whenever a settlement is for an amount different from the settlor's proportionate fault, MLA urges the Court to announce a rule that, while formulating a credit methodology, also determines whether any defendant, either settling or non-settling, has a right to seek contribution.

The problems which arise from piecemeal resolution of these issues are well illustrated by the saga of *Self*. The Eleventh Circuit, reasoning that *Leger* had been undercut by *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), opted for the *pro tanto* credit. *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d at 1548. It gave conflicting signals, however, regarding the availability of contribution. While it stated initially that "contributions cannot be obtained by one tortfeasor from a tortfeasor who has settled with and had been released by the claimant," *id.* at 1547,[14] it later suggested twice that the non-settlor retained its right to seek contribution. *Id.* at 1556, 1557.

On remand, the district court did not permit contribution, but the Eleventh Circuit again reversed. *Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d 1575 (11th Cir.), *cert. denied*, 113 S. Ct. 484 (1992). Noting that this Court, in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), and *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), had established a system of loss allocation based on proportionate fault, it concluded that the *pro tanto* credit adopted in *Self* required it to reject the so-

[14] The Fifth Circuit cites *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975), for this proposition. However, *Luke*'s contribution bar was determined under Louisiana law, and not federal maritime law.

called "settlement bar" rule and permit Great Lakes to pursue its contribution claim. 957 F.2d at 1582-83. Interestingly, the Eleventh Circuit opinion implies that the panel would have preferred to return to *Leger*. However, after stating that "*Edmonds* clearly does not overrule *Leger* directly," the panel noted that it was bound by the court's earlier opinion in *Self*. *Id.* at 1580 n.4.

If the Eleventh Circuit had analyzed the credit and contribution issues together initially, different rules might well have resulted. Instead, maritime defendants in the Eleventh Circuit are now unable to settle without being subject to claims for contribution by other defendants,[15] a result which has almost uniformly been condemned.[16] MLA urges this Court to dispel *Self*-type problems and retrospectives by considering, in the context of this litigation, both the form of the credit and the availability of contribution.

III.

THE COURT SHOULD ADOPT THE PROPORTIONATE CREDIT AND CONTRIBUTION BAR FEATURES OF THE MLA BILL

A number of federal courts have analyzed the relative merits of the *Leger* and *Self* credits,[17] although none has considered

[15] Theoretically, the settling defendant could secure an indemnity or hold harmless agreement from the plaintiff, thereby insulating it from further liability and trial expenses. Plaintiffs may be reluctant to give such assurances, however, and the current Eleventh Circuit rules are certain to have a chilling effect on the settlement process generally.

[16] An excellent discussion of contribution issues appears in *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989), which approves a settlement bar without deciding which credit formula should prevail.

[17] *See, e.g., Matter of Oil Spill of the Amoco Cadiz*, 954 F.2d 1279, 1314-18 (7th Cir. 1992); *Associated Elec. Co-Op v. Mid-America Transp.*, 931 F.2d 1266 (8th Cir. 1991); *In re The GLACIER BAY*, 1993 A.M.C. 1530 (D. Alaska 1993); *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218 (S.D.N.Y. 1991). *See also* Graydon S. Staring, *Meting Out Misfortune: How the Courts Are Allotting the Costs of Maritime Injury in the Eighties*, 45 La. L. Rev. 907, 923-25 (1985) (advocating *Leger*).

the continuing viability of the *Self pro tanto* credit in light of the Eleventh Circuit's final conclusion that contribution rights must follow.[18] No formulation is free from criticism or able to protect litigants from perceived unfairness in every circumstance. Nonetheless, MLA is convinced that the *Leger* principles, as set out in the MLA Bill, offer by far the best and fairest framework for dealing with the issues.

A. *A Proportionate Credit Will Best Promote Fair Settlements*

The debate over *Self* and *Leger* credits has manifested disagreement about which method best encourages settlements. Each promotes settlement in some respects, but for differing reasons, not all worthy of endorsement.

Most of the inducement to settle arising from a *Self pro tanto* credit comes directly at the expense of fairness. Since the plaintiff will always recover in full if any non-settling party is liable at trial, there is little incentive for the plaintiff to act responsibly in negotiating settlements early in the litigation with other parties. *See Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d at 1582. Some courts refer to the prospect of outright collusion. *See, e.g., McDermott, Inc. v. Iron*, 979 F.2d 1068, 1080 (5th Cir. 1992),

[18] An excellent and detailed analysis of *Self* appears in *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, Nos. 1911251, 1911252, 1993 WL 154448 (Ala. May 14, 1993). While within the Eleventh Circuit, the Alabama Supreme Court did not consider itself bound by *Self*, particularly in light of the conflict among the circuits. *Id.* at *6 n.1. Instead, it analyzed the alternatives, selecting the *Leger* approach as "the appropriate method for the disposition of maritime cases filed in Alabama state courts." *Id.* at *12.

cert. granted, 125 L. Ed. 2d 721 (1993); *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218, 221 (S.D.N.Y. 1991). It will be the non-settling defendant who bears the full brunt of any such agreement, without any opportunity to influence it. The only advantage of *Self* with a settlement bar to contribution is certainty. This Court, however, held in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975), that certainty which was unfair could no longer be approved in maritime law. Moreover, now that the Eleventh Circuit has held contribution to be available from the settling defendant following a *Self* credit, any perceived inducement to settle has likely evaporated.

The impact of credit rules on the willingness of non-settling defendants to settle will also depend upon perceived equities and litigation strategy. Under *Self*, it is argued, the non-settling defendant knows exactly what its share will be, and therefore will be encouraged to settle. Sometimes, however, just the opposite occurs. A non-settling defendant who believes that other defendants have paid too much in settlement might become intransigent regarding settlement in the hope that the *pro tanto* credit will reduce its potential payment exposure, if not eliminate it altogether. Indeed, that might have occurred below. River Don was found at trial to be 38% responsible for damage to the deck. However, by going to trial and obtaining a *Self pro tanto* credit, it limited its liability to $470,000,[19] or about 22% of the damage to the deck. Therefore, the *pro tanto* credit in this instance may well have served to *discourage* settlement. It will undoubtedly have that effect in some cases.

[19] $2.1 million in damages reduced to $1.47 million by the 30% fault of McDermott and the sling defendants and then to $470,000 on account of the $1 million settlement. Theoretically, if the settlement of the "sling defendants" had been $1.5 million, River Don would have paid nothing! That result promotes neither settlements nor fundamental fairness.

Leger avoids the taint of unfairness and discourages legal gamesmanship without giving up the bar to contribution which promotes settlements. *See Associated Elec. Co-Op v. Mid-America Transp.*, 931 F.2d 1266, 1271 (8th Cir. 1991); *Leger v. Drilling Well Control, Inc.*, 592 F.2d at 1250-51; *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218, 222-23 (S.D.N.Y. 1991). *But see Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1317 (7th Cir. 1992) (effect on settlements uncertain). The settlement process has always depended upon the ability of plaintiffs and defendants to assess with reasonable accuracy the size of the likely award. The normal balancing of litigation risks which occurs under proportionate fault promotes that process. *See Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d at 1582. Moreover, several courts have recognized that proportionate loss allocation prompts bargaining which typically leads to *fair* settlements. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975); *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d at 1318; *Associated Elec. Co-Op v. Mid-America Transp.*, 931 F.2d at 1271; *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d at 1548. The proportionate credit, by eliminating the prospect for a litigant to hide behind someone else's settlement, and by holding all defendants responsible for their own fault, will ultimately encourage settlement by all parties.

B. *A Proportionate Credit Will Prevent Ancillary Litigation*

Judicial economy will be advanced through adoption of a proportionate credit joined with a settlement bar. Jurisdictions which now have *pro tanto* credits typically also provide for a hearing to determine whether a settlement was made in good faith and for adequate consideration.[20] If such a hearing

[20] California, for example, has such a rule, but federal courts have been reluctant to borrow such state law provisions in maritime cases. *See, e.g., Daughtry v. Diamond M Co.*, 693 F. Supp. 856 (C.D. Cal. 1988).

is to be meaningful and offer any hope of realistic protection for non-settling defendants, it would seem that a mini-trial of sorts would be required. That in turn requires discovery, raises the prospect of legal motions, and generally places putative settlors in exactly the position they sought to avoid. *See Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d at 1582; *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1230 (9th Cir. 1989), *cert. denied*, 498 U.S. 890 (1990) (a securities case applying federal common law); *In re The GLACIER BAY*, 1993 A.M.C. 1530, 1535-36 (D. Alaska 1993). The alternative is a low threshold of inquiry in which courts will decline to analyze in detail the adequacy of any settlement thought to be arguably reasonable. Such review offers scant protection to non-settling defendants. The *Leger* proportionate credit avoids these problems by leaving the adequacy of a settlement exactly where it belongs: as a matter solely between the plaintiff and the settling defendant.[21]

The proportionate credit eliminates the basis upon which either settling or non-settling defendants might otherwise seek contribution from the other. The non-settling defendants, liable for no more than their proportionate share of plaintiff's damages, cannot satisfy the underlying premise of contribution that one tortfeasor paying more than his fair share may seek equitable relief from another paying less than his share.

[21] Adoption of a proportionate credit would effect further judicial economy in connection with an atypical aspect of this case. No determination was made at trial of the separate degrees of fault of plaintiff McDermott and the settling "sling defendants." A *Self pro tanto* credit should be applied against plaintiff's damages, reduced only by the plaintiff's own contributory fault. It appears that the result below also may have reduced the damages by the degree of fault of the settling defendants *before* applying the settlement credit. That, of course, would constitute a double reduction. Application of a proportionate credit makes this inquiry unnecessary, since the proportionate credit is for the *combined* fault of the plaintiff and the settling defendants.

Similarly, settling defendants who paid too much will have no claim against non-settling defendants, because they will not have paid less than their fair share. Of course, contribution will remain available among two or more non-settling defendants found liable to the plaintiff.[22]

The proportionate credit has not been immune from criticism that it requires ancillary litigation. Those criticisms, however, are unjustified. The Seventh and Eleventh Circuits have pointed to perceived problems in determining the share of the settled party. *See Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d at 1318; *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982). Litigants, however, have always had to deal with the fault of non-parties. A defendant will often argue that some party not present was the *real* cause of the accident.[23] In such circumstances, the conduct of all the players is before the jury. Asking them to determine the proportionate fault of an absent party whose conduct has been proven at trial will not create additional difficulty. Moreover, since the plaintiff has voluntarily agreed to settle with a party, it could clearly have arranged with that party to make key witnesses available as a part of the bargain. Thus, any inferred burden on plaintiffs is largely illusory. *See Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. at 223-24.

Another suggested administrative reason not to apply *Leger* is a perceived inefficiency, from the standpoint of both time and money. The *Amoco Cadiz* court suggested that *Leger*

[22] In the hypothetical, *supra* note 12, if plaintiff collected his entire $70,000 judgment from B, B would in turn have an action for contribution against C for C's "equitable" share of $40,000.

[23] This is particularly true in longshore personal injury litigation. While the stevedoring company is statutorily immune from contribution claims, the shipowner is free to argue that the stevedore's fault was the sole proximate cause of the accident, thereby seeking to escape liability itself. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 265 n.15 (1979).

would require additional litigation since the settled party had not participated. 954 F.2d at 1317-18. The court's comment was probably due in part to frustration over the size and complexity of that particular litigation. Few cases will equal it. Thus, the *Amoco Cadiz* litigation is a poor foundation for the creation of policy for the average case. Moreover, it is not clear exactly what additional litigation would be required. The plaintiff's claims could be reduced under *Leger* without the need to involve the settled party. The burden would be on the non-settlors to prove fault of the settled party, so no inequity to the plaintiff should result. Interestingly, even the *Self* court describes *Leger* as "efficient." 832 F.2d at 1548.

C. *A Proportionate Credit Will Promote Fundamental Fairness*

An essential feature of settlement credit rules should be fairness to *all* of the litigants. The proportionate credit is far superior to the *pro tanto* credit in this respect. The parties to the settlement should have no complaint, for they will have received exactly that for which they bargained. Moreover, the plaintiff will usually have received the settlement proceeds relatively early in the proceedings, and the settling defendant will have avoided contribution exposure and further litigation of that issue. Non-settling defendants may not complain, because under *Leger* they remain responsible only for their share of the plaintiff's loss, no more and no less.

While *Leger* serves to avoid outright collusive settlements, it also avoids the *appearance* of collusion and the myriad situations in which a non-settling defendant might otherwise be complaining to the court of a settlement tactically structured to the non-settlor's disadvantage. This case provides an illustration. While the opinion below notes, 979 F.2d at 1080, that the settlement was not allocated between damage to the deck and damage to the crane until *after* the verdict, McDermott

and the "sling defendants" might have allocated the settlement in advance of trial, either sealing the allocation with the court or disclosing it to all parties. Because other maritime theories suggested that the sling defendants alone might be liable for damage to the crane,[24] the settlement might logically have allocated most, if not all, of the settlement proceeds to crane damage. Such a pre-trial allocation might have received a more receptive review below. Had it been embraced by the court, the amount of River Don's credit would clearly have been reduced significantly. But that credit should not logically depend on factors controlled solely by the parties to the settlement. Under *Leger*, the allocation would be irrelevant. River Don would be responsible for its proportionate share of damage to the deck, regardless of how McDermott and the sling defendants allocated their settlement. Fundamental fairness requires that result.

D. *A Proportionate Credit Will Further the Trend in Maritime Law Toward Pure Comparative Fault*

A *Self pro tanto* credit, when combined with a bar to contribution, runs head first against the proportionate loss allocation principles of *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), and *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975). A non-settling tortfeasor, like Great Lakes Dredge & Dock Co. in *Self*, will be required to pay more than its proportionate share of the plaintiff's damages without being permitted a right of contribution against a joint tortfeasor who settled for less than its fair share. *Cooper Stevedoring* and *Reliable Transfer* simply do not permit such a result. From a legal standpoint, *Leger*'s

[24] AmClyde was protected from liability for crane damage by its contract with McDermott, and River Don was protected by the damage principles announced in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). 979 F.2d at 1077-78.

greatest strength is its harmony with *Cooper Stevedoring* and *Reliable Transfer*.

While *Self* interpreted *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), 269-70, as precluding *Leger*'s proportionate fault credit for settlements, 832 F.2d at 1546-47, that analysis failed to comprehend or take into account the narrow context in which *Edmonds* arose. While recognizing that some inequity to shipowners resulted, 443 U.S. at 269-70, the *Edmonds* Court felt obligated not to interfere with the "delicate balance" between shipowners, stevedoring companies and longshoremen which existed under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (1988). 443 U.S. at 273. No such "delicate balance" is presented in the settlement credit context. *Edmonds* did not address settlement issues. Furthermore, settling defendants typically enjoy none of the statutory immunities so important to the decision in *Edmonds*.

Edmonds is also invoked for the proposition that *Leger* improperly creates the risk that a plaintiff will recover less than full damages. *See, e.g., Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d at 1318. It is true that a plaintiff may accept less from a settling defendant than that defendant's share of the damages is subsequently determined to be. However, the converse is also true—a plaintiff may obtain a favorable settlement above what the settling party's share is later worth. Permitting the plaintiff to keep the benefit of his bargain is no more a double recovery than any "shortfall" resulting from a bad settlement would be a contravention of the *Edmonds* policy of full compensation.[25] *Leger* explained that no double

[25] In *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, Nos. 1911251, 1911252, 1993 WL 154448 (Ala. May 14, 1993), the court discussed "the perceived tension between Leger and Edmonds," concluding that no such tension need exist. *Id.* at *10-*11. Another excellent discussion of the "tension between *Edmonds* and *Reliable Transfer*" appears in *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. at 222.

recovery would occur because settlement dollars, obtained at a time of uncertainty, cannot be equated with damages at trial. 592 F.2d at 1249-50, 1250 n.10. Every settlement necessarily presents the risk that a defendant may have paid too much and the plaintiff may have accepted too little. But that is no reason not to promote settlements. Indeed, acceptance of a known, sure recovery at the expense of an uncertain, but possibly greater recovery at trial is the very essence of settlement.

Settlements are entered into willingly with the expectation that a party's interests will thereby be served. Surely it cannot be doubted that a plaintiff could settle his claim while the jury was deliberating for a lesser amount than the jury was prepared to award without offending the court's sense of fairness to the plaintiff. The same principle applies to earlier, partial settlements. *See Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. at 222-24. Accordingly, *Edmonds* does not require rejection of a *Leger* credit. *See id.* at 224. *See also* Evan T. Caffrey, Comment, *Holding the Bag-Proportional Fault and the Non-Settling Defendant: Self v. Great Lakes Dredge & Dock Co.*, 14 Tul. Mar. L. J. 415, 420-22 (1990).

IV.
IT IS ENTIRELY APPROPRIATE FOR THE COURT TO FASHION THESE RULES, AND NOT DEFER TO CONGRESS

The constitutional grant of admiralty and maritime jurisdiction is to federal courts, in Article III. No other field of substantive law was the subject of such treatment. From the beginnings of the nation, this Court has been the leading promulgator of rules for maritime loss apportionment.[26] That

[26] For an excellent dissertation of judicial development of this topic, *See* Graydon S. Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Cal. L. Rev. 304 (1957).

role has flourished in the last two decades with the opinions in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) and *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). Here, as there, Congress has not spoken. Thus, reference to legislative policy is not appropriate here, as it was in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Moreover, the issues presented herein are particularly appropriate for judicial determination, inasmuch as they concern the mechanics of maritime trials and settlement of maritime claims.

The lofty tradition of this Court's historical role as the primary framer of maritime law, as evidenced by such opinions as *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), was recently discussed by the late, renowned admiralty jurist, The Hon. John R. Brown. John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?* 24 J. Mar. L. & Comm. 249 (1993). This case provides a particularly apt opportunity for this Honorable Court to exercise its formative role, established by the United States Constitution, in development of the general maritime law of the United States.

V.
CONCLUSION

We most respectfully urge this Honorable Court to reverse the decision of the Court of Appeals for the Fifth Circuit and to adopt a proportionate settlement credit rule, together with a contribution bar, in accord with those provisions in the MLA Bill.

Respectfully submitted,

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APPENDIX

102D CONGRESS—1ST SESSION
H.R. 3318

To clarify and make uniform the maritime law of the United States with respect to the recovery and allocation of compensatory damages.

IN THE HOUSE OF REPRESENTATIVES
SEPTEMBER 12, 1991

MRS. BENTLEY introduced the following bill; which was referred to the Committee on the Judiciary.

A BILL

To clarify and make uniform the maritime law of the United States with respect to the recovery and allocation of compensatory damages.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Maritime Comparative Responsibility Act".

SEC. 2. EFFECT OF CONTRIBUTORY FAULT.

(a) Any contributory fault chargeable to a claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault but does not bar recovery.

(b) Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

SEC. 3. APPORTIONMENT OF DAMAGES.

(a) In an action involving fault of more than one party to the action, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating—

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded;

(2) the percentage in which the contributory fault, if any, of each claimant has contributed to causing that claimant's injury; and

(3) the proportionate relationship of the fault of each of the other parties to each claim.

For this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the proportionate degree of fault of each party to an action, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in an action in accordance with the findings, subject to any reduction under section 7, and enter judgment

jointly and severally against each party liable. For purposes of contribution under sections 5 and 6, the court also shall determine and state in the judgment each party's share of the judgment of each claimant in accordance with their respective proportionate fault.

(d) Upon motion made not later than one year after judgment is entered in an action, the court shall determine whether all or part of a party's share of a judgment is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties to the action, including a claimant at fault, according to their proportionate fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

SEC. 4. SET-OFF.

A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party, and any distribution of those funds back to the party making payment had been a payment to that party by the other party.

SEC. 5. RIGHT OF CONTRIBUTION.

(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury or death, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's proportionate share of a claimant's recovery, as determined in accordance with section 3.

(b) A person who enters into a settlement with a claimant has a right to contribution from other persons only (1) if the liability of the person against whom contribution is sought has been extinguished by the person seeking contribution and (2) to the extent that the amount paid in settlement was reasonable.

(c) This Act does not affect any rights of or to indemnity which otherwise exist.

SEC. 6. ENFORCEMENT OF CONTRIBUTION.

(a) If the proportionate fault of the parties to a claim for contribution has been established previously by the court, as provided by section 3, a party paying more than that party's proportionate share of the common liability shall, upon motion, be entitled to a judgment for contribution.

(b) If the proportionate fault of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a

judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(c) If a judgment has been rendered, the action for contribution shall be commenced within one year after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have—

(1) extinguished the common liability within the period of the statute of limitations applicable to the claimant's right of action against the person from whom contribution is sought and commenced the action for contribution within one year after payment, or

(2) agreed while the action was pending to extinguish the common liability and, within one year after the agreement, have done so and commenced an action for contribution.

SEC. 7. EFFECT OF RELEASE.

A release, covenant not to sue, or similar agreement entered into by a claimant and a person alleged to be liable for that claim—

(1) discharges that person from all liability for contribution,

(2) does not discharge any other persons alleged to be liable for the same claim unless it so provides, and

(3) reduces the claim of the releasing claimant against other persons by the amount of the released person's proportionate share of any common liability, as determined in accordance with the provisions of section 3.

SEC. 8. APPLICATION.

This Act applies to any action for personal injury or death, or both, arising out of a maritime tort which occurs on or after the date of the enactment of this Act.

SEC. 9. DEFINITIONS.

In this Act—

(1) the term "fault" includes—

(A) acts or omissions that are in any measure negligent or reckless toward the person of the actor or others, or that subject a person to strict tort liability; and

(B) breach of warranty, misuse of a product for which a defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages;

(2) the term "injury" includes—

(A) personal injury to a claimant; and

(B) death of a claimant's decedent; and

(3) the term "party" includes all defendants, third-party defendants, and persons who have been released from liability under section 7.